IN THE

Supreme Court of the United States

October Term, 1976

No. 76-

NELSON BUNKER HUNT, W. HERBERT HUNT
and LAMAR HUNT,

Petitioners,

v.

76-1403

MOBIL OIL CORPORATION, TEXACO, INC., STANDARD OIL COMPANY OF CALIFORNIA, THE BRITISH PETROLEUM COMPANY, LTD., SHELL PETROLEUM COMPANY, LTD., EXXON CORPORATION, and GULF OIL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP HIRSCHKOP
108 N. Columbus Street
P.O. Box 1226
Alexandria, Virginia 22313
(703) 836-6595

DANIEL P. LEVITT
919 Third Avenue
New York, New York 10022
(212) 688-1100

Attorneys for Petitioners

Of Counsel:
MAURICE N. NESSEN
ELLEN R. NADLER
KENNETH BERLIN

Nickerson, Kramer,
Lowenstein, Nessen,
Kamin & Soll
919 Third Avenue
New York, New York 10022
(212) 688-1100

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Petitioners Nelson Bunker Hunt, W. Herbert Hunt, and Lamar Hunt (hereinafter "Hunt") ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 12, 1977.

Opinions Below

The majority and dissenting opinions of the Court of Appeals for the Second Circuit have not yet been officially reported, but are annexed to this Petition as Appendix A.

The opinion of the United States District Court for the Southern District of New York appears at 410 F. Supp. 10 (1975) and is annexed as Appendix B.

Jurisdiction

The Court of Appeals entered judgment (Appendix C) on January 12, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). A final judgment of the District Court dismissing Count 3 of the complaint was entered on February 5, 1976, under Rule 54(b) of the Federal Rules of Civil Procedure.* Jurisdiction in the District Court was asserted under 15 U.S.C. §§9, 15, 22 and 26 and under 28 U.S.C. §§1332 and 1337.

Questions Presented

Count 3 of the complaint, the dismissal of which is at issue here, alleges that from at least 1971 through 1974 respondents, the seven largest multinational oil companies, conspired among themselves, in violation of the antitrust laws, to manipulate the conduct of the companies producing crude oil in Libya so as to impose competitive disadvantages upon Libyan oil production for the benefit of their own much larger Persian Gulf production. A second purpose was to induce the independent Libyan producers—particularly Hunt—to adopt a negotiating posture in that country not only greatly advantageous to the respondents' own contemporaneous negotioations in the Persian Gulf but also highly likely to result in nationalization of one or more

* The District Court's opinion on the Rule 54(b) motion is annexed as Appendix D.

of the independents, and which in fact led to Hunt's nationalization in June 1973. The vehicle for this multifaceted conspiracy was the Libyan Producers Agreement, a secret written agreement among all the Libyan producers (plus respondent Gulf) which the seven respondents, through repeated secret caucuses from which the independents were excluded, twisted into a wickedly anticompetitive weapon against the independent signatories. The Libyan government was not a party to the Agreement, which was kept secret from it, nor was Libya admitted to the secret caucuses of the seven. Indeed, Libya was as much an intended victim of the conspiracy as was Hunt. For purposes of this suit, Hunt does not challenge the validity of any action by the Libyan government, and it did not name Libya as a party or as a conspirator.

Nonetheless, the majority below, on a pre-discovery motion to dismiss for failure to state a claim, and relying principally upon the moribund jurisdictional decision in *American Banana Company* v. *United Fruit Company,* 213 U.S. 347 (1909), held that this Court's "act of state" doctrine barred Hunt from seeking antitrust redress against respondents. Their theory was that, whenever the public acts or "motivation" of a foreign government might conceivably require exploration in an antitrust suit, the "act of state" doctrine confers complete immunity on private conspirators named as the sole defendants.

The following questions are presented:

1. Did the majority below err in construing this Court's "act of state" cases to insulate private parties from antitrust claims that in any way involve possible proof of pub-

lic acts of a foreign government, even though the validity of no government act is questioned, the conduct only of private parties is challenged, and neither the sovereign nor any government agent is named as a party or as a conspirator?

2. Should not this Court protect the integrity of its decisions in *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927) and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), which the majority below declined to follow but which subject private conspirators to judicial scrutiny even though a foreign state's public act was one of the instruments chosen by the conspirators to inflict harm upon an unwanted competitor?

3. Did the majority below err in declining to follow the teachings of this Court's decision in *Cantor* v. *Detroit Edison Co.*, 96 S.Ct. 3110 (July 6, 1976), and of other "state action" cases, that private parties do not escape responsibility for their own private wrongdoing merely because they implicate a government in their conduct?

4. In jumping to the unwarranted conclusion that Count 3 defines a conspiracy involving only an act of nationalization and nothing more, did the Court of Appeals read the complaint in a too narrow and begrudging manner, one prohibited by this Court's decisions in *Conley* v. *Gibson*, 355 U.S. 41 (1957), *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) and *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974)?

5. Is the decision below so inconsistent with the nearly simultaneous but contrary decision of the Court of Appeals for the Ninth Circuit in *Timberlane Lumber Co.* v. *Bank of America* (9th Cir., Dec. 27, 1976, No. 74-2142), as to make appropriate a resolution of the conflict by this Court?

6. Should private conspirators, on a pre-trial motion to dismiss, be permitted to evade the antitrust causation test defined in such cases as *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 375 U.S. 100 (1969), merely because they used government action to inflict injury upon an unwanted competitor?

7. Should this Court tolerate creation of a gaping loophole in antitrust enforcement, as it pertains to foreign commerce, which cloaks private conspirators with absolute immunity from judicial challenge so long as they implicate a foreign government in their wrongdoing, or use a foreign government to damage or destroy a competitor? And should it do so at a time when disclosures of bribery and other unlawful payments by multinational companies (including a number of the respondents here) demonstrate just how easy such "immunity baths" are to procure?

Statutes Involved

1. Section 1 of the Sherman Act, 15 U.S.C. §1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

2. Section 73 of the Wilson Tariff Act, 15 U.S.C. §8:

> "Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between

two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. * * *''

Statement of the Case

1. The facts alleged*

Hunt is a non-integrated independent oil producer. In 1957, it received concessions from the then Libyan government to search for, develop and produce crude oil. Shortly thereafter, Hunt geologists discovered the Sarir Field, one of the half-dozen largest oil fields in the world with reserves in excess of 11 billion barrels. In 1960, Hunt assigned an undivided one-half interest in the field to respondent British Petroleum. Production began in 1967, and reached a level of 450,000 barrels a day. Hunt sold his share of this production in the "third-party" market; much of it entered the United States.

Respondents, seven of ten named defendants in this action, are the world's largest vertically integrated oil companies—the so-called seven majors or "Seven Sisters":

* Since Count 3 was dismissed under Rule 12(b)(1) for failure to state a claim, and the motion was directed at the face of the complaint and filed before discovery had begun, the facts for present purposes are those that appear in the amended complaint, annexed as Appendix E.

Mobil, Texaco, SoCal, British Petroleum, Shell, Exxon and Gulf. Each of the majors explores for, produces, refines, transports and markets crude and refined oil on an international basis. All except Gulf had crude production in Libya. But even as to the six majors with Libyan interests, the crude production controlled by them in the Persian Gulf (Saudi Arabia, Iran, Iraq, Kuwait, Abu Dabai, Qatar, Dubai and Oman) exceeded by a factor of ten their Libyan production.

In September of 1970 Libya's new radical government, led by Colonel Qaddafi, extracted from the Libyan producers an agreement dramatically increasing the government's "take" from crude oil production. Its successful tactic was to single out one independent producer, Occidental, and bring it to terms by a shrewd combination of harsh threats and tempting inducements, thereafter imposing the same terms upon the other companies.

In December of 1970, seeking to match the unprecedented terms won by Libya, the heretofore quiescent OPEC nations themselves formulated comparable demands for various parts of the world, including the Persian Gulf. Not to be outdone, Libya responded by declaring the necessity for still another round of increases in its own government "take". This time Libya singled out Hunt, as well as Occidental, to respond by January 16, 1971. The Seven Sisters, already unhappy with the stiff competition posed in European and North American markets by the Libyan independents with their low-sulphur crude and nearness to markets, now saw the weak negotiating stance of these independents leading to what they called a "leapfrogging"

of producing-country demands. Libya's demands would stimulate Persian Gulf demands, only to lead to further escalated demands from Libya. The situation threatened to get out of control.

The Seven Sisters responded by meeting secretly in New York City in early January 1971. They agreed jointly to confront all the oil producing countries as a group; "leapfrogging" would, they thought, no longer be possible. They invited the Libyan independents to join them, beginning on or about January 11, 1971.

In the next few days at meetings in New York City, all the Libyan producers, in addition to Gulf which had no Libyan production, agreed to form a world-wide united front for negotiating purposes. And to meet the majors' concern that a vulnerable independent producer like Hunt, with no non-Libyan source of crude, might be forced by threat of nationalization or cutback to accept terms in Libya that the Seven Sisters would not want to confront in the Persian Gulf, the Seven drafted a so-called written "sharing agreement". The central provision was that any Libyan producer shut down or cut back because it resisted Libyan demands would be entitled to obtain substitute crude from the other signatories—first, from Libyan production of all the other parties, and if that were not available, from the majors' own Persian Gulf crude.

But the Seven Sisters well knew how to turn necessity into advantage. They did not let slip this unique historical opportunity to gain control over the too-often uppity Libyan independents—and sharply to diminish their ability to compete. Under the Agreement they drafted, and which

was executed on January 15, 1971,* no participant was to be permitted to agree with Libya over the terms of "government take" without the assent of all the others. Any producer who left the fold might lose its entitlements to substitute crude, while retaining its obligations to supply crude to the other signatories—a frightening prospect for an independent with production confined to Libya. Moreover, the majors insisted on imposing stringent restrictions upon the right of any party to resell Persian Gulf oil obtained from the majors under the Agreement. Such oil could not be resold except to "pre-existing customers" in Europe and the Western Hemisphere. Since Hunt's only pre-existing customers were Exxon, Shell and Hess—themselves parties to the Agreement—Hunt would be forced to resell Persian Gulf crude to them at whatever price they chose to pay, or lose the oil.**

The benefits for which Libyan independents like Hunt sacrificed their freedom of action soon proved illusory. Armed with the promises contained in the Agreement and assured of his fellow signatories' good faith, Hunt on January 16 rejected Libya's new demands. But the oil companies' world-wide united front disintegrated by the end of the month. The Seven Sisters concluded that their negotiations in the Persian Gulf should be split off from everyone's negotiations in Libya. Negotiations did proceed separately during the spring of 1971, and the Seven Sisters took that opportunity to negotiate terms in the Persian Gulf which gave them substantial competitive advantages

* The Libyan Producers Agreement is set out as Exhibit A to the amended complaint, which is Appendix E hereto.

** This restriction is challenged in Count 1, which survived a motion to dismiss, and is not before this Court.

over the Libyan operators, and which cost them little or nothing because production ceilings could be raised in the Persian Gulf to make up for increased costs. That could not be done in Libya.

When Libya nationalized BP's half of the Sarir Field on December 7, 1971, ostensibly for political reasons, the safety net provisions of the Agreement first came into play. Pursuant to its terms, Hunt supplied millions of barrels of crude to BP to make up for the production it lost in Libya. When Hunt complied with the request of BP and the other signatories that it decline Libya's urgent demand that it market for the government's account the crude which had previously belonged to BP, Hunt's production was cut back. Hunt then began to receive both Libyan and Persian Gulf crude from some, but not all, of the parties to the Agreement.

By mid-1972 events in Libya had taken a more ominous turn. Libya now wanted not simply an increased government "take", but also a 51 per cent ownership interest in all Libyan operations. Singled out to respond first to this new demand was Hunt. Because they were themselves secretly negotiating terms of equity participation in the Persian Gulf, on a 25 per cent government ownership basis, the Seven Sisters were acutely anxious to prevent Hunt from acquiescing in the Libyan demand that it surrender an interest twice that size—at least until conclusion of the Persian Gulf negotiations. And Hunt was now particularly vulnerable to pressure because, since BP's nationalization, the government was itself operating the Sarir Field, half of whose oil belonged to Hunt.

Aware of its vulnerability, Hunt asked, as a condition for standing firm against Libya, that the Libyan Producers Agreement with its safety net be amended, e.g., to lift the resale restriction on Persian Gulf crude which was enabling Exxon and Shell to squeeze oil from Hunt at below-market prices. Because Hunt's continued resistance to Libya's demands was seen by the Seven Sisters as essential to their ability to avoid harsh participation terms in the Persian Gulf, they blithely, and only after secret discussions among themselves in New York and Chicago, gave Hunt assurances sufficient to induce him to stand fast, although less than he had sought. The Libyan Producers Agreement was renewed on November 20, 1972, through the end of 1974.

Hunt faithfully performed its side of the bargain; it rejected Libya's demands—despite Libya's tempting offer of special considerations were Hunt the first to agree to 51 per cent participation. And Hunt paid the price of fidelity; in the spring of 1973 it was first shut in and later nationalized. The other operators then proceeded to abandon Hunt. One after another they declined to meet their contractual obligations. They neither supplied the oil due Hunt under the Agreement, nor did they attempt to negotiate for Hunt's reinstatement when many of them accepted the same Libyan terms they had earlier induced Hunt to reject. As was their practice, the Seven Sisters' decisions whether to honor their commitments to Hunt were made, not company by company, but in concert at a series of secret meetings and discussions.*

* The concerted boycott of Hunt by the Seven Sisters and three other independents forms the substance of Count 2; that count withstood a motion to dismiss and is not before this Court. Breach of the Agreement by the ten defendants comprises Count 4, which likewise withstood a motion to dismiss and an application for a stay pending arbitration. It, too, is not before this Court.

2. The proceedings below

In April of 1974, Hunt commenced an action against Mobil in the United States District Court for the Northern District of Virginia. That action was subsequently withdrawn and refiled in its present form against ten defendants in the Southern District of New York on March 7, 1975. Count 1 challenged the resale restriction; Count 2, the concerted boycott. Count 3 charged a conspiracy by the majors to disadvantage Libyan crude vis a vis their own Persian Gulf crude, to sacrifice Hunt in order to protect their own Persian Gulf interests, and to eliminate Hunt from the industry. Count 4 complained of breach of the defendants' contractual obligations to Hunt.

The defendants filed motions to dismiss each of the counts on a wide variety of grounds, only one of which succeeded—the challenge to Count 3 on the basis of the "act of state" doctrine. The District Court ruled, on November 5, 1975, that although recent disclosures concerning the propensity of multinational corporations to bribe foreign government officials gave it grave concern regarding the policy implications of a broad "act of state" doctrine (App. B at 51a), it was compelled to dismiss Count 3 by this Court's decision in the *American Banana* case in 1909 and the lower court decision in *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). The court reasoned that the nationalization caused the injury complained of, that Hunt would have to prove that "but for defendants' conspiratorial manipulative activities" Hunt would not have been nationalized, and that the court could not adjudicate the claim

without exploring the motivation behind the Libyan government's decision. (App. B at 49a) But in light of the fearsome policy implications for law enforcement of the "act of state" doctrine so construed and its belief that the appellate courts should have an opportunity to reconsider the decisions which it felt constrained to apply, the District Court on February 5, 1976 granted Hunt's request that final judgment be entered under Rule 54(b) of the Federal Rules of Civil Procedure, thereby enabling Hunt to take the issue to the Court of Appeals. (Appendix D)

The Court of Appeals affirmed, over the dissent of Judge Van Graafeiland. The two-judge majority (Judge Mulligan and District Judge Gagliardi) held that the "traditional" definition of "act of state" doctrine compelled dismissal. It expressed the view that the trial court would not be able to determine how Hunt would have fared in Libya absent the conspiracy without a "wholesale examination of Libyan policy—how did it treat other companies, what provoked its 'displeasure,' how far could concessions by Hunt appease President al-Qadhafi." (App. A at 20a) The majority purported to find support for this approach in this Court's 1909 decision in *American Banana* and in the lower court decision in *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.* It purported to see nothing in this Court's decisions in *United States* v. *Sisal Sales Co.*, 274 U.S. 268 (1927), or in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), to support the proposition, advanced by Hunt, that private parties who conspire against a competitor do not escape judicial scrutiny of their wrongdoing merely because they use a governmental act or agency to advance their conspir-

acy. And the majority concluded that this Court's recent decision in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976), left that "traditional" view of the doctrine unimpaired.

Judge Van Graafeiland, dissenting, observed that the traditional view of the "act of state" doctrine as enunciated in cases from *Underhill* v. *Hernandez*, 168 U.S. 250 (1897) to *Dunhill* insulated from judicial scrutiny *only* those claims which necessarily require the courts to pass upon the "validity" of foreign governmental acts. That would not be necessary here. He noted that there are many cases in which our courts, while adjudicating claims against private persons, "receive evidence concerning the acts of foreign officials and the role played by American citizens in motivating such acts."* (App. A at 24a) Moreover, he found the majority's more expansive approach to immunity wholly at odds with this Court's recent decision in the "light bulb program" case, *Cantor* v. *Detroit Edison Co.*, 96 S.Ct. 3110 (July 6, 1976), a case not discussed by the majority. In *Cantor*, he noted, this Court made clear that "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." (App. A at 25a-26a) And unlike the majority, he expressed concern that the "act of state" doctrine "not be permitted to screen [individual defendants] from accountability for their illegal acts." (App. A at 27a)

* He cited *United States* v. *Lira*, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); *United States* v. *Cotten*, 471 F.2d 744, 746 n. 4 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973); and *Stonehill* v. *United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969). (App. A at 24a-25a) He might have added the line of cases discussed at pp. 29 to 30, *infra*.

Reasons for Granting the Writ

I. The Majority Decision Below Misread, Misapplied, and Unduly Expanded the Scope of This Court's "Act of State" Cases.

The decision below erred in allowing the presence of an "act of state" in Libya to create an "immunity bath" for the private parties whose own wrongdoing in the United States and London is the sole subject of Count 3.

A. The majority misread this Court's "act of state" cases.

Both the majority and the dissenting judge in the Court of Appeals purported to rely upon what they believed to be the traditional view of the "act of state" doctrine as enunciated by this Court. And there is not much room for disputing what that view is. As this Court recognized as recently as *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 691 (1976), the classic formulation of the doctrine is found in *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897), where Chief Justice Fuller wrote:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972); and in *Dunhill*, this Court reiterated that the essence of the doctrine lies in avoiding a situation in which an American court will be required to

pass upon the legality or validity of a sovereign act by another nation, or to provide a remedy if invalidity were found.

1. Sisal Sales and Continental Ore

But how broad is the immunity which flows from that principle? As the dissenting judge below noted, the desire to avoid passing judgment upon the public acts of a foreign government has not been construed to bar federal judicial scrutiny of claims asserted against private parties whose own alleged acts of wrongdoing could not be said to have been compelled by a foreign government. Thus, in *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927), plaintiffs challenged a monopoly allegedly achieved by defendants through the aid of discriminatory legislation in Mexico and Yucatan which they had procured to disadvantage their competitors. The fact that the defendants had implicated the governments of Mexico and Yucatan in their misdoings, and that the court might have to explore how that legislation was procured and what would have happened "but for" that legislation—the same questions which lie at the heart of the majority's decision in the present case—was held by this Court not to insulate them from judicial scrutiny. Nor were the defendants in *Sisal Sales* helped by the fact that the legislation they had procured was the stick with which plaintiff was beaten. This Court said, in language applicable here,

> "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws." 274 U.S. at 276.

So, too, in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), plaintiffs complained that they had been excluded from the Canadian market by the defendants who had achieved a monopoly in ferrovanadium and vanadium oxide. They alleged that their business in Canada had been destroyed because the defendants had caused agents of the Canadian government to refuse to purchase from them. Despite these allegations and despite the fact that the harm complained of was "caused" by the buying decisions of government agents, this Court held the defendants subject to suit under the antitrust laws. It noted that, as in the present case, plaintiffs:

> "* * * do not question the validity of any action taken by the Canadian Government or by its Metals Controller. * * * What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental from the Canadian market. As in *Sisal*, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government." 370 U.S. at 706.

This Court concluded, in language whose message the majority below resolutely refused to apply,* that:

* The majority below attempted to distinguish *Continental Ore* on the ground that "no act of the sovereign was involved," arguing that Canada would not have approved the defendants' monopolistic objections. But, as pointed out, *infra*, Libya was not likely to have approved of the Seven Sisters' conspiratorial aims—which were directed as much at Libya as at Hunt. And this Court and others have not read *Continental Ore* as involving no state act. *See, e.g., Cantor* v. *Detroit Edison Co.*, 96 S. Ct. 3110, at 3118 and n. 29; *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25, 33 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

"[t]he offer of proof at least presented an issue for the jury's resolution as to whether the loss of Continental's Canadian business was occasioned by respondents' activities." 370 U.S. at 706.*

2. *American Banana and Buttes*

Rather than follow *Sisal Sales* or *Continental Ore,* the majority below chose to rely instead upon this Court's ancient decision in *American Banana Company* v. *United Fruit Company,* 213 U.S. 347 (1909). There, plaintiff complained both of private misconduct by the defendant in Costa Rica and defendant's having caused the government of Costa Rica to use soldiers and officials to seize a portion of plaintiff's plantation and supplies, thereby preventing it from carrying on its business. To Mr. Justice Holmes, this case presented only a problem concerning the *extraterritorial* reach of the antitrust laws. The Justice, who had a special—and no longer valid—view of the limitations of those laws, said that it was "surprising to hear it argued that they [acts outside the jurisdiction of the United States] were governed by the act of Congress." 213 U.S. at 355. He cited "the general and almost universal rule" that the legality of an act "must be determined wholly by the law of the country where the act is done." 213 U.S. at 356. The acts complained of, *both private and public,* were outside the reach of the Sherman Act because "they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute." 213 U.S. at 357. To Mr. Justice Holmes, the problem was not

* The same right to have the factfinder determine whether the private parties' misconduct was a material cause of the injury complained of flows from this Court's decision in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 375 U.S. 100 (1969).

that a governmental act was being challenged, but that an American statute was being applied to measure the legality of conduct in Costa Rica, whether public or private.

American Banana is not a viable guide to decision, but only a museum piece in the evolution of the antitrust laws. The Holmes approach to extraterritorial jurisdiction was scrapped long ago. *United States* v. *Sisal Sales Corp.,* 274 U.S. 268 (1927); *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945); and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962). Both in *Sisal Sales* and in *Continental Ore,* this Court expressly refused to apply *American Banana,* implying that it was to be relegated to its facts.*

Occidental Petroleum Corp. v. *Buttes Gas & Oil Co.,* also relied upon by the majority below, is an equally inappropriate basis for decision. Like the present case, it also involved the deprivation of plaintiffs' oil concession and was dismissed on the basis of *American Banana.* But *Buttes* was not a dispute about private company misbehavior in the United States and London. *Buttes* arose out of an international dispute involving division of the waters of the Persian Gulf. The parties had offshore oil

* In contrast to this case, which alleges that Libya was as much a dupe of defendants' conspiracy as was Hunt, the complaint in *American Banana* alleged, in effect, that the Costa Rican government was a co-conspirator with the defendant. Moreover, while Hunt does not challenge the validity of Libya's nationalization, the plaintiff in *American Banana* alleged and argued that Costa Rica's acts were unlawful. Given that allegation, and the necessity of resolving the plaintiff's charges of illegal acts, invasions of territory, illegal court decisions and procurement of troops, the Court in *American Banana* could not escape the spectre of possible embarrassment to the executive branch in its relations with Costa Rica. In contrast, a decision to resolve Cout 3 on its merits here carries no potential for such embarrassment. *See* footnote at p. 21, *infra*.

concessions granted by two adjacent sheikdoms. Plaintiffs alleged that the defendants had instigated a boundary dispute which led to plaintiffs' being denied access to their offshore concession. The trial court emphasized in its opinion that plaintiffs sought not only monetary damages but also an injunction to protect their right to extract oil from the disputed area. It concluded that "the determination of foreign states' boundaries is certainly not a permissible function of this court." 331 F.Supp. at 103. Plaintiffs' monetary claims were also dismissed, the court emphasizing that one of the sheikdoms had been named in the complaint as a co-conspirator and that in order to recover plaintiff would have to prove both that the conspiring sheikdom "had issued a fraudulent territorial waters decree" and that defendants had induced the government of Iran to assert claims which interfered with plaintiffs' rights. 331 F. Supp. at 110. It is of no concern now whether the court in *Buttes* properly construed the plaintiffs' contentions, or even whether it correctly decided the damages claim. It is clear that the court rested its decision on its belief that it was being asked to declare the decree of a sovereign fraudulent and to determine whether the defendants had improperly procured conduct by the government of Iran—declarations which, in the court's words, would be the "very sources of diplomatic friction and complication that the act of state doctrine aims to avert." 331 F.Supp. at 110.

The "act of state" doctrine has not changed much since its definition in *Underhill* almost a century ago. What is proscribed is adjudication by an American court of the legality or validity of a sovereign act by a foreign government in circumstances where our foreign relations would

be unduly embarrassed.* Where a court is not called upon to pass judgment upon the act of a foreign government in these circumstances, private parties may not hide behind such governmental acts to shield their own private misconduct. That is the hard-core teaching of the "act of state" cases. The majority decision below failed to apply that narrow teaching.

The differences which split the Court of Appeals panel in part concern interpretation of the cases. In applying the "act of state" doctrine in an antitrust context, is it the majority's interpretation of *American Banana* and of *Buttes* that is to control? Or are courts to apply the principles of *Sisal Sales* and *Continental Ore*, which permit litigation of claims against private parties even when those private parties have implicated foreign governments or their agents in their conspiracies?

B. The majority also misread the complaint.

But the division among the judges below also concerns the manner in which the doctrine is to be applied. All they had before them were the complaint and a pretrial motion to dismiss unencumbered by factual affidavits or any of the fruits of discovery. The proper question was, under

* It was particularly inappropriate to apply the "act of state" doctrine in the present case where there was so little potential for embarrassing our foreign relations. As noted in the opinions below, the United States government publicly and officially declared Libya's nationalization of Hunt unlawful. (App. A at 18a) And courts around the world—including American courts—have entertained "hot oil" suits brought by Hunt and by several of the respondents here to prevent purchasers from buying the oil seized from BP, Hunt, and later from Texaco and others. Even if the majority were correct, as it is not, that the validity of Libya's act must be put in issue here, the doctrine—intended as it is to avoid undue embarrassment—should not apply.

Conley v. *Gibson*, 355 U.S. 41 (1957), and *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), whether the respondents (not Hunt) could establish "beyond doubt that [Hunt] will be able to prove no set of facts in support of [its] claim which would entitle [it] to relief."*

1. The private conduct complained of

Are there facts here that Hunt might be able to prove at trial that would entitle it to relief despite the "act of state" doctrine? The answer must surely be in the affirmative. The amended complaint alleges a conspiracy by seven large private companies to manipulate the conduct of all the private companies doing business in Libya. One aim of the conspiracy was to disadvantage Libyan oil production vis a vis the Seven Sisters' own Persian Gulf production. That aim was achieved long before the Libyan government nationalized Hunt on June 11, 1973. Defendants accomplished a substantial part of that purpose when they prevented the Libyan independents from knuckling under to Libyan demands for increased "government take" in January 1971; when they were able to postpone settlements in Libya regarding increased "government take" and later regarding equity participation until they had themselves made more favorable arrangements in the Persian Gulf; and when they were able to prevent the Libyan independents from accepting the government's participation demands until after Hunt had been nationalized.

* Judge van Graafeiland expressed doubt that Hunt would be able to prove its charges at trial. (App. A at 24a) But the judge had no reason to be familiar with the substantial quantity of documents that attest to the fact that the Seven Sisters repeatedly met in secret, concerted their conduct regarding Hunt, and did and said in private what they do not admit in public. Fortunately for Hunt, some of the senior executives who attended these secret meetings brought their own Boswells with them, and what was said and decided has been preserved for posterity—and for trial.

Their aims, pursued in this country and to the detriment of this country's commerce, were largely achieved whether or not the Libyan government ever nationalized Hunt—which came as an added bonus. If these objectives were pursued in an unlawful manner, as by secret meetings among the conspirators, and if respondents thereby inflicted harm upon Hunt, as by subjecting it to competitive disadvantages prior to nationalization, petitioners have stated a claim under Count 3 which has *nothing* to do with whether Hunt was nationalized.*

Contrary to the teachings of *Conley* v. *Gibson*, 355 U.S. 41 (1957), and of the Chief Justice's opinion for a unanimous Court in *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974) the majority below chose not to consider "all" the facts that plaintiffs might be able to offer at trial when it passed upon the sufficiency of the complaint.**

2. The irrelevance of Libya's motivation

That was not the majority's only error in applying the doctrine. If Hunt is able to establish at trial, as it can out of respondents' own documents, that the respondents met together and schemed to induce Hunt to take certain posi-

* One distinguished commentator has written that it is when the "act of state" is the *only* act complained of that the "act of state" doctrine applies. Where, as here, other acts are alleged, immunity is not available. 1 J. von Kalinowski, *Antitrust and Trade Regulation*, §5.02[3](b).

** This error is particularly unfortunate in a complex antitrust case like this one where, as this Court has cautioned, "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). *See also*, this Court's more recent reiteration of this warning in *Norfolk Monument Co., Inc.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969).

tions vis a vis the Libyan government by giving Hunt false assurances regarding what they intended to do under the Libyan Producers Agreement, and if Hunt, relying upon these assurances, did take positions which led to its nationalization, it matters not what the motivation of the Libyan government was or what the Libyan government would have done in other circumstances. These same "but for" questions were not, after all, insurmountable obstacles in *Sisal Sales* or *Continental Ore*, where they were equally applicable.

The majority's error may be illuminated by the following analogy. Suppose defendants, conspiring against an enemy, push him into the street in front of a United States mail van. Or persuade him to lie down and sleep in the street on their false assurances that the street has been closed to traffic, although they know that a United States mail van is about to pass through and is likely to inflict injury upon the sleeping victim. Would anyone hold that the liability of these private defendants for their own misconduct should turn upon whether the ultimate injury is inflicted by a private vehicle rather than by a governmental one, or whether the government has consented to be sued?* Surely, private defendants are answerable for their own wrongs without regard to the nature of the instrument with which they choose to inflict injury upon the plaintiff.

That is this case. The complaint alleges only that private companies conspired against Hunt. They caused Hunt to take actions based upon assurances and promises

* As a matter of tort law, the role of the mail van would *not* be a "superceding cause" such as to shield the wrongdoers from personal liability for the harm they set in motion. *See* Prosser, *Torts*, §44 (1971 ed.), and Restatement (Second) of Torts, §§440-42.

that were made to be broken. They damaged Hunt wholly apart from the nationalization, and if the final coup de grace was administered by Libya, it was because of the manner in which respondents manipulated the conduct—not of the Libyan government--but of their fellow signatories to the Libyan Producers Agreement.

II. The Majority Decision Below Failed to Apply the Teaching of This Court's Decision in *Cantor* v. *Detroit Edison*.

Cantor v. *Detroit Edison Co.*, 96 S. Ct. 3110 (July 6, 1976), was decided after briefing had been completed in the Court of Appeals but prior to argument. Its significance was pressed by the dissenting judge, who found it a persuasive basis for reversing the District Court which had not had the benefit of the decision at the time it dismissed Count 3. But the majority neither applied the teachings of *Cantor* nor discussed the case.

Cantor and the other "state action" cases are not technically "act of state" cases, for they do not involve actions by *foreign* governments or the acts of *foreign* government officials. But the operating principle underlying *Cantor* is entirely applicable to the present case. Both *Cantor* and the "act of state" cases face the same question: when may a federal court enforce the antitrust laws when there is implicated in the acts of private defendants one form or another of governmental action? In the "act of state" cases, the object is to determine whether our nation's relations with the foreign government in question would be unduly embarrassed by the judicial determination sought, and whether a determination of invalidity would be awk-

ward or impossible to enforce. In *Cantor* and the "state action" cases, the question to be asked is whether it is appropriate, in light of the legislative intent behind the antitrust laws and the principles of federalism, to enforce a federal rule that might compromise or otherwise embarrass some state regulatory program or legitimate conduct by a state government official. The required balancing act is similar. And the manner in which this Court resolved *Cantor* has profound implications for the present case.

In *Cantor*, a retail seller of electric light bulbs complained that Detroit Edison, a private utility company engaged in the distribution of electricity, provided light bulbs to its customers without any separate charge. The cost was built into the electricity rates. The utility relied upon the Michigan Public Utility Commission's regulations and tariffs, saying it was doing only what the law permitted it to do. Indeed, it argued persuasively that the existing tariffs made unlawful the imposition of any separate charge. It said, as do respondents here, that plaintiff was in effect complaining of the regulation itself, and that such a complaint was barred by the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943). Both the trial court and the Court of Appeals applied *Parker* v. *Brown*, and held defendant's conduct immune from challenge. But this Court reversed, distinguishing *Parker* from *Cantor* on the ground that, in the latter case, no public official or agency was named as a party and plaintiff did not contend that any state action violated the antitrust laws.* 96 S. Ct. at 3117. The opinion

* In the present case, on the other hand, these same circumstances concerning who was sued and what was challenged were declared by the majority "superficial and not legally sufficient." (App. A at 17a-18a)

by Mr. Justice Stevens for the Court noted that the question was not simply whether defendant was acting solely in obedience to state law, because "typically cases of this kind involve a blend of private and public decisionmaking." 96 S. Ct. at 3118. And it went on to note that "the Court has already decided that the state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." 96 S. Ct. at 3118 (footnotes omitted). In summarizing the state action cases, the Court observed that:

> "In each of these cases the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking. In each case, notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." 96 S. Ct. at 3118.

In applying this principle to *Cantor*, the Court held that even though the existing tariffs compelled the practice complained of, "such a program is primarily respondent's, not the Commission's." 96 S. Ct. at 3118. And it added that:

> "[t]here is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law. Accordingly, even though there may be cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct implementing it, this record discloses no such unfairness." 96 S. Ct. at 3119.

The complaint in the present case is much easier to sustain than the one in *Cantor.** Libya was not, after all, a party to the Libyan Producers Agreement, the principal vehicle of the conspiracy complained of in Count 3. On the contrary, the Libyan Producers Agreement was kept secret from the government. Libya was in fact an intended victim of the Agreement. And Libya did not, of course, require the defendants to hold secret caucuses in New York, Chicago and London to coordinate what their positions would be vis a vis Hunt or the other Libyan independents. Libya did not require the Seven Sisters to scheme so as to delay the completion of Libyan negotiations until after more favorable terms had been arrived at in the Persian Gulf. Libya did not compel the Seven Sisters to plot to put Libyan crude oil at a competitive disadvantage in comparison with their own Persian Gulf production. Libya did not require the Seven Sisters falsely to induce Hunt to take positions that were utterly contrary to what Libya wanted. Beginning in the middle of 1972 and continuing until June 1973, Libya wanted nothing so much as to have Hunt be the first oil company to acquiesce in an arrangement wherein the government would have 51 per cent equity in its operations. The government said so, publicly as well as privately. Senior executives of each of the defendants so reported. The fact is that the Seven Sisters set out, not to obey the Libyan government's wishes and not to comply with them, but to frustrate them. And their purpose was to prevent the Libyan government from getting what it wanted and to give themselves a competitive advantage in the Persian Gulf—at the expense of Libya as well as Hunt. If Detroit Edison, which obtained and administered the complained of regulatory program in partnership with the Michigan Public Utility Commission, was unable to invoke its partner's public status to protect it from antitrust scrutiny, how can the Seven Sisters, who conspired against Libya, find greater protection behind the skirts of that government?

The plain teaching of *Cantor*, and the many other "state action" cases,* is that a private party is answer-

* Although three Justices dissented from the majority's approach and the separate positions of the Chief Justice and of Mr. Justice Blackmun, it does not appear from the opinion of Mr. Justice Stewart that any of the dissenters would have immunized from suit private conduct not compelled by force of the regulations—still less, concerted conduct kept secret from the Commission and aimed at frustrating its publicly announced wishes.

Moreover, as the District Court held below, the present case—unlike *Cantor* and many of the "state action" cases cited at the end of this section—does not raise freedom of assembly and petition problems; the so-called *Noerr-Pennington* doctrine does not apply to lobbying addressed to foreign governments. (App. B at 40a-41a)

* *Cantor* is, of course, not the first case permitting trial of charges involving government action. This Court has done so in such cases as *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972), where it ordered trial of allegations that defendants conspired to deny plaintiff access to administrative and judicial tribunals; and in *Waliker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), allowing trial of charges that patents were fraudulently procured. The Courts of Appeals for the First, Fourth, Fifth, Ninth and District of Columbia Circuits have already established that antitrust defendants do not obtain immunity from suit by the simple expedient of embroiling government officials in their conspiracies. *See, e.g., George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970), where defendants conspired to obtain government specifications that would exclude plaintiff; *Asheville Tobacco Bd. of Trade, Inc.* v. *Federal Trade Commission,* 263 F.2d 502, 509 (4th Cir. 1959), where the defendant Tobacco Board of Trade regulated auction sales of tobacco; *Woods Exploration & Producing Co., Inc.* v. *Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972), where defendants allegedly filed false forecasts of gas production to cause the Texas Railroad Commission to issue allowables which prevented plaintiff from maximizing his own production; *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.*, 351 F.2d 851

(footnote continued on next page)

able for its own conduct unless it can show that what it did was the product of compulsion by a government, and that it had no role in procuring that compulsion. And it is the defendants' burden to make such a showing. The majority below erred when it failed to apply that teaching.

III. This Court Should Review the Decision Below to Resolve the Conflict Between the Ninth Circuit and the Second Circuit.

The majority decision below and that of the almost simultaneous decision of the Court of Appeals for the Ninth Circuit in *Timberlane Lumber Co.* v. *Bank of America* (9th Cir., December 27, 1976, No. 74-2142) (annexed as Appendix F), may not technically be in conflict; one bent on doing so may be able to distinguish the cases. But the approach of the two courts to the "act of state" doctrine in an antitrust context is in the most profound conflict. Resolution of this conflict is particularly appropriate here, where a principal prop of the decision of the Second Circuit is an earlier *per curiam* decision of the Ninth Circuit (*Buttes*) which in effect is cast aside by the *Timberlane* court.

Timberlane involved an allegation by an American lumber company with operations in Honduras that the Bank of America conspired with affiliated companies and other interests in Honduras to destroy plaintiff's Honduras lumber export business. Plaintiff complained that, in order to accomplish these objectives, the bank engaged in a number of questionable financial transactions leading to a foreclosure on property essential to plaintiff's Honduras operations. Acting through a judicial officer termed an "interventor," the defendants obtained the use of the government's guards and troops to cripple and for a time completely shut down plaintiff's milling operation. Plaintiff's manager was falsely arrested and imprisoned, and was vilified in the press. Defendants argued that this case was just like *American Banana*, where another private company had also been accused of using judicial process and police and troops to enforce judicial process in order to eliminate a competitor. The District Court had dismissed the complaint from the bench on the basis of *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, concluding that the injuries allegedly suffered by Timberlane resulted principally from acts of the Honduran government in connection with the judicial enforcement of security interests in plaintiff's plant.

(9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), involving bribery of public purchasing officers; and *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), challenging the Redskins' lease with the government of the District of Columbia. In each of these cases, defendants unsuccessfully argued that it was some governmental action, and not theirs, of which plaintiffs complained. If these cases are right, the decision below is not.

Despite *American Banana* and despite its own *per curiam* decision in *Buttes*, the Court of Appeals reversed. It held that:

> "[e]ven if the coup de grace to Timberlane's enterprise in Honduras was applied by official authorities, we do not agree that the doctrine necessarily shelters these defendants or requires dismissal of the Timberlane action." (App. F at 118a)

Citing this Court's decisions in *Continental Ore, Sisal Sales*, and *Dunhill*, and giving the shortest of shrift to *Buttes*, it observed that:

"[i]t is apparent that the [act of state] doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government." (App. F. at 119a)

In *Continental Ore,* the appellate court noted, the Canadian government had made a private corporation its exclusive buying agent and this corporation, acting in concert with the defendants, had excluded plaintiff from the market. In *Dunhill,* interventors appointed by the government were held liable with respect to money paid them by mistake. In *Sisal,* governmental action (including legislation) procured by the defendants for anticompetitive purposes did not insulate them from liability. And the court observed that the same result had been reached in *United States* v. *The Watchmakers of Switzerland Information Center, Inc.,* 1963 Trade Cas. ¶70,600 (S.D.N.Y. 1962), *order modified,* 1965 Trade Cas. ¶70,352 (S.D.N.Y. 1965). There, plaintiffs had successfully complained of agreements formulated privately and not compelled by the Swiss government, but then recognized by that government and approved by it.

One might attempt to distinguish *Timberlane* from the present case on the ground that the "act of state" involved in *Timberlane* was enforcement of judicial process, process which in the ordinary course private parties might obtain. But that is a distinction without a difference. After *Sisal Sales,* which involved legislative decrees and not mere process, the rule cannot be that if a plaintiff loses his property by government decree he cannot complain, but that if he loses property by judicial order he may do so. In any event, as demonstrated above, it is a misreading

of the present complaint to construe it as complaining only of an act of nationalization. Plaintiffs do not here contest the right or power of the Libyan government to do what it did, and they do not now accuse respondents of improperly inducing the Libyan government to act. What plaintiffs do complain of is the manner in which respondents, in concert, manipulated the Libyan operating companies—all of which were private companies. It is that manipulation which is at issue, and plaintiffs are aware of no case insulating that kind of private conduct from judicial scrutiny under a bogus "act of state" defense.

IV. The Decision Below Has Unacceptable Policy Implications for Antitrust Enforcement.

It is not of academic interest alone that the majority below jumped quickly to the wrong conclusions regarding what Hunt might be able to prove at trial, unduly expanded the scope of immunity defined by this Court's "act of state" cases, and declined to apply the teachings of *Cantor* and the other "state action" cases. For, if allowed to stand, the decision below will have profound and unacceptable consequences for antitrust enforcement.

The thrust of the decision below is that if private conspirators can embroil in their schemes some foreign governmental program or act, they may thereby procure absolute immunity from judicial review. That is not acceptable policy.

The present case demonstrates how intolerable its consequences are. Petitioners would be able to show at trial that the seven largest multinational oil companies repeat-

edly met secretly, principally in New York but also in Chicago and London, over a period of several years to coordinate their anticompetitive schemes. These included putting American and other companies producing oil in Libya at a competitive disadvantage, manipulating those companies so as to attain competitive advantages for the Seven's own Persian Gulf production, and—finally—elimination of an unwanted competitor. Meetings of this kind are plainly offensive to the antitrust laws.* Executives of putative competitors are not permitted to meet and coordinate their activities against other competitors. Should immunity attach to such meetings simply because one of the weapons chosen by the conspirators was a governmental act? And should immunity be granted on the basis of a governmental act when the conspiracy preceded the act by several years, and involved a number of private actions totally unrelated to the alleged "act of state"?

If the decision below is allowed to stand, predators will have a formal invitation to achieve their anti-competitive dreams without fear of judicial scrutiny, so long as they take the precaution of implicating a government in their plans.

Recent events demonstrate how easy such foreign governmental complicity is to procure. Large multinational companies—including several of the respondents named in

* The Department of Justice did indicate at the time that it had no intention to prosecute the signatories of the Libyan Producers Agreement on the facts as it then knew them. But the Seven did not inform the Department of the secret meetings complained of in Count 3 or of their private purposes. In any event the Department's "no action" position never confers immunity either from private suit or from civil suit by the Department.

this action—have publicly admitted making payments to foreign government officials to procure favorable governmental action. And, wholly apart from company-initiated bribery, there have also been disclosures in recent months of American multinational companies conforming their conduct, at the urging of foreign governments, in ways which injure other Americans.

The Department of Justice has taken the position that American companies which acquiesce in foreign government demands relating to the so-called Arab boycott, for example, may thereby violate the antitrust laws. On January 16, 1976, the Antitrust Division, on behalf of the United States, sued Bechtel Corporation and several related corporate entities. *United States* v. *Bechtel Corp.*, Civ. No. C 76 99 (N.D. Cal.), reported at Antitrust & Trade Reg. Rep. (BNA), No. 796, E-4, Jan. 11, 1977. The complaint alleged that in violation of Section 1 of the Sherman Act the corporate defendants and certain co-conspirators conspired unreasonably to restrain trade in the provision of parts, systems, materials, equipment, and services for construction projects in so-called Arab League countries. The claim was that, at the instance of the Arab League countries, defendants had agreed to avoid importing into those countries goods and services furnished by persons blacklisted by the countries. As the government explained in its Competitive Impact Statement filed on January 10, 1977 in support of a proposed consent judgment:

> "In sum, the Boycott is a long-standing arrangement among certain Arab League Countries, the Central Boycott Office, enterprises doing business in those Arab League Countries, and others, pursuant to which international import trade and commerce in those countries

> is conducted consistent with a concerted refusal to deal with Blacklisted Persons—including United States Blacklisted Persons. It is, as such, a horizontal agreement among purchasers in Arab League Countries, the purpose of which is to restrain the trade between those countries and others in the products of Blacklisted Persons." Antitrust & Trade Reg. Rep. (BNA), No. 796, at E-5.

Defendants, of course, raised the "act of state" defense. In its competitive Impact Statement, the Antitrust Division rejected the notion that conspiratorial conduct by American businessmen—even at the urgent behest of foreign governments and involving foreign government complicity—was immune from judicial challenge. The Division stated that:

> "The Government would have contended that foreign sovereign compulsion may not override enforcement of conflicting United States law expressing a sovereign and public interest as to conduct within the United States * * * and that the act of state defense does not apply to conduct outside the territory of the state whose acts are invoked as its basis * * *." Antitrust & Trade Reg. Rep. (BNA), No. 796, at E-6.

Bechtel was not litigated to a conclusion. But the contentions of the parties thereto reflect how adverse the thrust of the decision below would be to enforcement of our antitrust laws, at least as perceived by the Antitrust Division.*

Other important efforts at antitrust enforcement are also jeopardized by the decision below. There is an emerging pattern of price-fixing and other anti-competitive

* Precisely the same view has been publicly pronounced by the Division in its recent "Guide to Antitrust and International Operations," dated January 26, 1977, the text of which was published in CCH Trade Reg. Rep. No. 266, Feb. 1, 1977. *See,* Case K and discussion at p. 50, and Case L and discussion at p. 53.

practices evolving from the relationship between large multinational companies and their host governments, particularly in the natural resources area. On January 29, 1976 a federal grand jury in Chicago returned an indictment against eight major potash producers, charging them with conspiring with officials of the provincial government of Saskatchewan, Canada, to control United States potash production and prices in conjunction with that government's own program of holding back potash production and preventing price declines. At the same time, the Antitrust Division, on behalf of the United States, filed a civil complaint directed at the same conduct. *See, United States* v. *AMAX, Inc.,* Crim. No. 76 CR 783 and Civ. No. 76 C 2393 (N.D. Ill.), reported in Antitrust & Trade Reg. Rep. (BNA), No. 771, A-6, July 6, 1976.

In *Westinghouse Electric Corp.* v. *Rio Algom Ltd.,* No. 76 C 3830 (N.D. Ill.), a large American corporation sued both foreign and American uranium producers, alleging that the Canadian government had developed a program to reduce overproduction and to shore up prices, in which program the defendants conspired. The case is reported at Antitrust & Trade Reg. Rep. (BNA), No. 800, A-13, February 8, 1977.

Should these patterns of conspiratorial action between foreign governments and large multinational companies be put outside the scope of the antitrust laws, price-fixing will become a way of life in international commerce.

The decision below confers upon predatory businessmen a hunting license to liquidate competitors with the assistance of foreign governments or their officials. In *Cantor,*

California Motor Transport and the other "state action" cases, and in *Sisal Sales, Continental Ore* and the other "act of state" cases, this Court has demonstrated that it will not countenance such gaping loopholes in antitrust enforcement. That policy should lead this Court to review the decision below.

Conclusion

For the foregoing reasons, petitioners urge that this Court issue a petition of certiorari to review the decision below.

Respectfully submitted,

PHILIP HIRSHKOP
108 N. Columbus Street
P.O. Box 1226
Alexandria, Virginia 22313
(703) 836-6595

DANIEL P. LEVITT
919 Third Avenue
New York, New York 10022
(212) 688-1100

Attorneys for Petitioners

Of Counsel:

MAURICE N. NESSEN
ELLEN R. NADLER
KENNETH BERLIN

Nickerson, Kramer,
Lowenstein, Nessen,
Kamin & Soll
919 Third Avenue
New York, New York 10022
(212) 688-1100

APPENDICES

Appendix A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 9—September Term 1976

Argued October 26, 1976 Decided January 12, 1977

Docket No. 76-7052

NELSON BUNKER HUNT, W. HERBERT HUNT and LAMAR HUNT,

Plaintiffs-Appellants,

against

MOBIL OIL CORPORATION, TEXACO, INC., STANDARD OIL COMPANY OF CALIFORNIA, THE BRITISH PETROLEUM COMPANY, LTD., SHELL PETROLEUM COMPANY, LTD., EXXON CORPORATION, GULF OIL CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, GRACE PETROLEUM CORP. and GELSENBERG AG,

Defendants-Appellees.

Before MULLIGAN and VAN GRAAFEILAND, Circuit Judges and GAGLIARDI, District Judge.*

Appeal from a final judgment, entered pursuant to Fed. R. Civ. P. 54(b), of the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge*, dismissing one count of a four count complaint.

* Of the Southern District of New York, sitting by designation.

Affirmed.

Daniel P. Levitt, New York, New York (Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, New York, New York, Kenneth Berlin; Philip Hirschkop & Associates, Ltd., Alexandria, Virginia, Philip J. Hirschkop of Counsel) for Plaintiffs-Appellants.

Edward F. Howrey, Washington, D.C. (Howrey & Simon, Washington, D.C., A. Duncan Whitaker, Harry E. Jennings, Jr., Mark D. Wegener; Mobil Oil Corporation, New York, New York, Richard H. Zahm, Juliet Shepard of Counsel), for Defendant Mobil Oil Corp.

(Kaye, Scholer, Fierman, Hays & Handler, New York, New York, Milton J. Schubin; Texaco Inc., New York, New York; Charles F. Kazlauskas, Jr., G. Kenneth Handley, Lawrence R. Jerz, of Counsel) for Defendant Texaco Inc.

(Lord, Day & Lord, New York, New York, Gordon B. Spivack, John W. Casties, 3d, Harry G. Skarsky, David H. Marks, Carolyn Ellis; Pillsbury, Madison & Sutro, San Francisco, California, Turner H. McBaine, Wallace L. Kaapcke, Thomas E. Haven, of Counsel), for Defendant Standard Oil Company of California.

(Shea, Gould, Climenko, Kramer & Casey, New York, New York, Bruce A. Hecker, Joseph Ferraro, of Counsel), for The British Petroleum Company Limited.

(Sullivan & Cromwell, New York, New York, Robert MacCrate, Robert M. Osgood, Barbara A. Mentz, of Counsel), for Defendant Exxon Corporation.

Mulligan, Circuit Judge:

This appeal raises the question whether the district court properly dismissed before trial, on the basis of the act of state doctrine, the third antitrust claim of the plaintiffs-appellants' complaint seeking treble damages from the named defendants-appellees as the result of the nationalization of the plaintiffs' oil producing properties in the Sarir Field by the Libyan government on June 11, 1973. We hold that the motion to dismiss was correctly decided and affirm the judgment of the district court.

I

Nelson Bunker Hunt filed a complaint on March 3, 1975 in the United States District Court for the Southern District of New York charging in the first three counts that the named defendants had unlawfully combined and conspired to the damage of the plaintiff in violation of section 1 of the Sherman Act, 15 U.S.C. §1, and section 73 of the Wilson Tariff Act, 15 U.S.C. §8. A fourth claim alleged damages arising from a breach of contract. The complaint was amended by stipulation on January 9, 1976 adding as plaintiffs W. Herbert Hunt and Lamar Hunt. Hereinafter the plaintiffs are referred to as "Hunt." The complaint on the basis of the antitrust claims alone seeks damages of not less than $125 million before trebling. Prior to filing its answers containing denials, affirmative defenses and counterclaims, certain of the defendants (Mobil Oil Corporation, Texaco, Inc., Standard Oil Company of California, The British Petroleum Company (B.P.), Exxon Corporation, Gulf Oil Corporation, Occidental Petroleum Corporation and Grace Petroleum Corporation) moved to dismiss the first, second and third claims for lack of subject matter jurisdiction and for failure to state claims upon which relief could be granted, pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. These defendants also moved to dismiss the breach of contract claim on grounds

not relevant to this appeal. In an opinion, reported at 410 F. Supp. 10, filed on November 5, 1975, United States District Judge Edward Weinfeld denied the motion to dismiss the first and second antitrust claims but granted the motion to dismiss the third antitrust claim. The disposition of the breach of contract claim is covered in the trial court's opinion but is not here pertinent.

Thereafter, on January 22, 1976, Judge Weinfeld granted Hunt's motion for a final judgment dismissing the third claim as to all the defendants pursuant to Fed. R. Civ. P. 54(b) upon the express condition that the appeal be prosecuted with dispatch. A final judgment dismissing the third claim as to all defendants was entered on February 4, 1975, thus permitting this otherwise interlocutory appeal by Hunt.

In granting the Rule 54(b) motion, Judge Weinfeld stated, *inter alia,* that if the motion were denied, and thereafter on appeal from any judgment entered with respect to the first two claims the dismissal of the third claim was reversed, a duplicative lengthy trial would be required creating additional but unnecessary expense to the parties. He further found that this appeal would not delay the prospective trial nor would it interfere with the discovery process. We agree that on these grounds the motion was properly decided. Therefore, we reject the defendants' argument that this determination constituted an abuse of discretion and consequently proceed to the merits of the appeal.

II

Hunt is a non-integrated independent producer of oil which in 1957 obtained an oil concession in Libya. The seven major oil producers, who are included as defendants here, sometimes called "The Seven Sisters", are vertically integrated companies generally producing oil in both Libya

and the Persian Gulf fields.[1] In November 1961, low sulphur oil was discovered in Libya at the Sarir Field, which eventually reached a level of 450,000 barrels a day shared equally by Hunt and B.P. which had a one-half undivided interest in the concession. In September 1969, Colonel Mu'ammar al-Qadhafi assumed power in Libya under a new government, the Revolutionary Command Council (RCC) which announced a policy of increasing the price of Libyan crude oil as well as the government's share or "take" in the price. The RCC's policy envisioned increased governmental control over production and production facilities. The heightened militancy of Libya resulted in agreements which were forced upon all the oil producers in Libya in September 1970, substantially increasing the take of the Libyan government in their profits. These agreements occasioned similar demands by the Persian Gulf countries which were members of the Organization of Petroleum Exporting Countries. That organization formulated a series of resolutions promulgated in December 1970 calling for more control by the producing nations over production. Despite the recently concluded agreements of Libya with its oil producers, the RCC demanded new increases in prices as well as taxes early in January 1971. The Libyan government first moved against Hunt and Occidental making certain unilateral "non-negotiable" demands which had to be accepted prior to January 16, 1971 and which were at variance with existing agreements with those oil producers.

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1. The seven major oil producer defendants are Mobil Oil Corporation, Exxon Corporation, Shell Petroleum Corporation, Ltd., Texaco, Inc., Standard Oil Company of California, The British Petroleum Company, Ltd. and Gulf Oil Corporation. They explore for, produce and refine crude oil, transport both crude oil and refined petroleum products and market refined petroleum products. The bulk of their crude oil production (about 90%) is in the Persian Gulf area (Saudi Arabia, Iran, Iraq, Kuwait, Abu Dhabi, Qatar, Dubai and Oman). Gulf has no Libyan production. Defendants Occidental, Gelsenberg and Grace are diversified companies producing crude oil in Libya.

In an effort to present a united front and fearful that the Libyan policy would escalate the demands of the producing nations in the Persian Gulf area, the seven majors met secretly in January 1971 in New York City to structure their resistance to the demands of the oil producing countries. In light of their concerted activity and the antitrust implications it presented, the major oil companies sought and obtained a clearance letter from the Department of Justice which indicated that it had no present intention of bringing any antitrust action on condition that the independent Libyan oil producers be included in any joint action proposed. The independent producers, including Hunt, were thereupon invited to participate in the meetings with the majors. These meetings culminated in the drafting of a so-called "sharing arrangement" known as the Libyan Producers Agreement of January 15, 1971 (the Agreement) which was supplemented and amended on October 18 and December 16, 1971 and November 21, 1972. The Agreement in general provided that if any party's crude oil production in Libya was cut back as the result of government action, all other producers would share in the cutback on a proportionate basis. It further provided that if there was insufficient Libyan oil to meet contractual obligations to existing European or Western Hemisphere customers due to restrictions or a government shutdown, the Persian Gulf producers would supply the Libyan producers with Persian Gulf oil at cost, with an option to pay cash in lieu of oil at a nominal sum per barrel. At that time Hunt had three such customers, all of whom were signatories to the Agreement and two of whom, Exxon and Shell, were among the seven majors. The Agreement as well as the subsequent amendments and supplements were reported to the antitrust division of the Department of Justice. Hunt was a party to the initial agreement and the subsequent modifications.

On December 7, 1971 the Libyan government nationalized B.P.'s half of the Sarir Field and demanded that Hunt market B.P.'s share of the Sarir production for Libya's

account. Appellants allege that in response to the requests and assurances of B.P. and the other majors and in reliance upon the Agreement, Hunt refused the Libyan demand. As a result, Libya evicted Hunt personnel from Sarir in early 1972 and cut back Hunt's permissible oil production by 50%. Hunt and B.P. as a consequence of these events received crude oil from the other parties to the Agreement. In October 1972, the Libyan government demanded an immediate 50% equity participation in Hunt's interests in Sarir. Hunt again rejected the Libyan demands. Hunt alleges that as a result of his non-cooperation with the Libyan demands, the Libyan government on December 11, 1972 refused to permit further export of Hunt's oil. On May 24, 1973 Libya terminated his right to produce and export crude oil and on June 11, 1973 pursuant to Law 42 of 1973 it nationalized all of Hunt's assets.

III

The sole issue on this appeal is whether the district court erred in dismissing the third antitrust claim of Hunt which is set forth in the margin.[2] The gravamen of this claim is

2.

THIRD CLAIM

61. Plaintiff Hunt realleges each and every allegation contained in paragraphs 1 through 45.

62. Since at least 1970, the seven majors along with co-conspirators name and not named, have engaged in a combination and/or conspiracy in unreasonable restraint of the foreign trade and commerce of the United States, in violation of the Sherman Act, 15 U.S.C. §1, and of Section 73 of the Wilson Tariff Act, 15 U.S.C. §8.

63. As part of the unlawful conduct complained of, the seven majors have combined and conspired among themselves to preserve the competitive advantage of Persian Gulf crude oil relative to that of Libyan crude oil, and to diminish competition from Libyan crude oil producers. To these ends they have combined and conspired to prevent plaintiff Hunt and other Libyan producers from reaching any agreement with the Libyan government inconsistent with that

(footnote continued on next page)

that seven majors combined and conspired in violation of the Sherman and Wilson Tariff Acts to preserve the competitive advantage of Persian Gulf crude oil over that of Libyan crude oil and to diminish competition from Libyan crude oil producers. The mechanism employed is alleged to be the Agreement which precluded Hunt from reaching any settlement with Libya inconsistent with the competitive advantage of the defendants and through which the defendants manipulated Hunt's dealings with Libya to the extent that Hunt was eventually nationalized, suffering substantial loss of profits as well as other unspecified damage.

Hunt's complaint does not name Libya as a defendant or in any way suggest that it is a co-conspirator of the named defendants. Nonetheless Judge Weinfeld reasoned that the combination or conspiracy charged did not of itself cause the damage complained of but rather that the damage resulted from the action of Libya in cutting back Hunt's production, shutting off its oil and finally nationalizing its properties. Thus he found that Hunt would be required to establish that *but for* the conspiracy Libya would not have committed any of these aggressive actions. This he decided would require judicial inquiry into "acts and conduct of Libyan officials, Libyan affairs and Libyan policies

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competitive advantage, even where they knew that the necessary and foreseeable consequence of their conduct would be Hunt's elimination as a Libyan crude oil producer.

64. In furtherance of this unlawful combination and conspiracy, the seven majors entered into written agreements with Hunt and other Libyan producers, manipulated the course of Libyan negotiations so as to advance their own interests in the Persian Gulf, and followed a course of action that led to Hunt's nationalization and elimination from the production of Libyan crude oil.

65. By reason of this unlawful combination and conspiracy, Hunt has been and will continue to be injured in his business and property. He has sustained damages, the full extent of which cannot presently be calculated, but which include lost profits on his half interest in the 11 billion barrels of crude oil contained in the Sarir Field.

with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions." 410 F. Supp. at 24. He concluded that this inquiry was foreclosed under the act of state doctrine.

IV

The appellants have vigorously attacked the application of the act of state doctrine to the facts pleaded in its third claim. Whatever great expectations appellants may have anticipated from the Supreme Court's decision in *Alfred Dunhill of London* v. *Republic of Cuba*, —— U.S. ——, 96 S. Ct. 1854 (1976), which was decided after the decision below was rendered, have been blighted. *Dunhill* reaffirmed the doctrine in traditional terms, announcing that it "'precludes the courts of this country from inquiring into the validity of the *public* acts a recognized foreign sovereign power committed within its own territory.' *Banco Nacional de Cuba v. Sabbatino* . . . and that it applies to 'acts done within their own states, in the exercise of *governmental* authority.' *Underhill* v. *Hernandez* . . . ." Id. at 1867. The majority opinion of Mr. Justice White in *Dunhill* underscored "public" and "governmental" since the act complained of there, the failure of Cuba to return to petitioner Dunhill certain funds paid to a Cuban government-controlled corporation for cigars sold to Dunhill by this Cuban cigar business before government seizure, was found to be an act of the sovereign committee in the course of a purely commercial operation.[3] *Dunhill* declined to extend the act of state doctrine to situations where the sovereign has descended to the level of an entrepreneur. Appellants conceded on the oral argu-

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3. The dissenting opinion of Mr. Justice Marshall with whom Justices Brennan, Stewart and Blackman joined would have held the acts complained of within the proscription of the act of state doctrine. 96 S. Ct. at 1871.

ment of this appeal that the nationalization of Hunt's properties was not a purely commercial act within the *Dunhill* exception. Expropriations of the property of an alien within the boundaries of the sovereign state are traditionally considered to be public acts of the sovereign removed from judicial scrutiny by application of the act of state rubric. Indeed such action as that taken here by Libya is cited in *Dunhill* as an example of non-commercial sovereign activity within the ambit of the doctrine. See ——U.S. at ——, 96 S. Ct. at 1866.

Any possible doubt about this issue is in any event removed since upon the seizure of Hunt's property on June 11, 1973 President al-Qadhafi announced "[W]e proclaim loudly that this United States needs to be given a big hard blow in the Arab area on its cold, insolent face. . . . The time has come for the Arab peoples to confront the United States, the time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless of the cost."[4] The note of the United States to the Libyan government on July 8, 1973 in response both to the seizure and the public statements of Libya concerning it, characterized the expropriation as "political reprisal against the United States Government and coercion against the economic interests of certain other U.S. nationals in Libya."[5] We conclude that the political act

4. Statement of the State Department, Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 93rd Cong., 2d Sess., pt. 6, at 316-17 (1974). The commentary that accompanied Libya's Law 42 of 1973 that effectuated the seizure described the act as "a warning to the United States to end its recklessness and hostility to the Arab nations." It further stated that, "In view of . . . American impudence and the continued disregard for Arab rights and destines, it was necessary to strike a blow against U.S. policy. . . ." A. Rovine, Digest of United States Practice in International Law 1973 at 334.

5. A. Rovine, Digest of United States Practice in International Law 1973 at 335.

complained of here was clearly within the act of state doctrine and that since the disputed pleadings inevitably call for a judgment on the sovereign acts of Libya the claim is non-justiciable.

V

In finding the doctrine applicable to the pleadings in issue Judge Weinfeld placed principal reliance upon *American Banana* v. *United Fruit Co.*, 213 U.S. 347 (1909) a decision dubbed by appellants as an artifact and museum piece of no precedential value. In *American Banana* the plaintiff sued for treble damages under the Sherman Act alleging that his banana plantation had been seized and his business destroyed by the confiscatory acts of the Costa Rican government which had acted at the defendant's instigation in furtherance of his anti-competitive behavior. The Supreme Court, in an opinion authored by Mr. Justice Holmes, held, in reliance on *Underhill* v. *Hernandez*, 168 U.S. 250 (1897), that since the seized plantation was within the de facto jurisdiction of Costa Rica, its seizure by that state was an act of sovereign power which could not be litigated in our courts. The opinion further held that since the acts complained of occurred outside of the United States they were beyond the jurisdictional scope of the Sherman Act.[6]

There can be no question that as to this latter facet of the opinion, the extraterritorial sweep of the Sherman Act, *American Banana* is no longer a viable precedent. This

6. Appellants argue that Mr. Justice Holmes had a uniquely narrow view of the Sherman Act. His disaffection for that legislation needs little documentation. E.g., Letter from Justice Holmes to Harold J. Laski, March 4, 1920, in 1 Holmes-Laski Letters 248-49 (1953 ed. M. Howe). However, the comment is not really germane. The unanimous opinion of the Court is hardly suspect because of the possible animus of its author. In any event, as we shall develop, the antitrust and act of state elements of the decision are distinct.

aspect of the case has been explicitly rejected by later Supreme Court cases which hold that, "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Continental Ore Co.* v. *Union Carbon & Carbon Corp.*, 370 U.S. 690, 704 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 276 (1927). Hence, we agree with appellants that the Sherman Act is applicable to the cause pleaded in the third claim. However, the fact that the court has jurisdiction does not make the issue justiciable. *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 773-74 (1972) (Powell, J., concurring). Were the Sherman Act not applicable here we would never reach the act of state doctrine which is a manifestation of judicial abstention.

Appellants argue that both *Sisal* and *Continental Ore*, *supra*, overturned *American Banana's* application of the act of state doctrine, Not so. *American Banana* on this point rested on *Underhill* v. *Hernandez*, *supra*, and the classical definition of the act of state doctrine there was reiterated must later in both *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964) and *Alfred Dunhill of London* v. *Republic of Cuba*, *supra* 96 S. Ct. at 1859 n.7, so that it can hardly be consigned to the oblivion that appellants consider it richly deserves.

In *Sisal* the antitrust complaint alleged a conspiracy among American bankers and corporations dealing in sisal, a plant fiber used to make twine, and a Mexican corporation which purchased that product from local producers in the Yucatan, the major source of sisal. The Mexican company became the sole purchaser of sisal and laws were solicited and enacted in both Mexico and the Yucatan which allegedly gave it advantages over all other competitors. One of the American companies then became

the exclusive selling agent of the Mexican corporation in all the world markets thus permitting the defendants to acquire complete domination over the market obtaining the power to fix prices and eliminate competition, the classic hallmarks of the section 2 violation. Mr. Justice McReynolds' opinion distinguishes *American Banana* on the Sherman Act issue, pointing out that the act of seizure committed there was performed in Costa Rica while in *Sisal* the conspiracy took place in the United States and was made effective by acts performed here. Although the act of state doctrine was raised by one of the appellees (represented by a certain Harold R. Medina) the Court makes no specific mention of the doctrine. Although it cites *American Banana's* proposition that a "seizure by a state is not a thing that can be complained of elsewhere in the courts", it found that circumstances in *Sisal* were "radically different" from those in *American Banana* even though the conspirators were "aided by discriminatory legislation." 274 U.S. at 276. While Mr. Justice McReynolds characterized the plaintiff's pleading in *Sisal* as "confused, difficult to follow and as an excellent example of bad pleading" the opinion itself is hardly as clear as a mountain lake in springtime. It is clear however that it does purport to overrule *American Banana's* act of state holding and that it considered the assistance of the sovereign through the mechanism of favorable legislation engineered by the defendants to be of considerably less moment than the expropriation by the state of the plaintiff's properties in the earlier case.[7] In any even, we deem

7. Most commentators have also concluded that *American Banana's* precedential value on the act of state doctrine was undiminished by *Sisal*, or any other case cited for that proposition by appellants. E.g., A.B.A., Antitrust Developments 365 (1975); K. Brewster, Antitrust and American Business Abroad 97 (1958); W. Fugate, Foreign Commerce and the Antitrust Laws §2.21. (1973).

it to be of no value to the appellants except on the jurisdictional thrust of the Sherman Act which, as we have pointed out, has been confirmed by later cases and is not disputed here.

Continental Ore Co. v. *Union Carbide & Carbon Corp.*, *supra*, we find to be of no assistance to the appellants on the act of state issue. The antitrust violation there asserted involved two American corporations and several subsidiaries (including a Canadian subsidiary) of one of these corporations which had succeeded in monopolizing 99% of the vanadium market in the United States. The Canadian defendant, Electro Met of Canada, was an agent of the Canadian government and, while such, excluded the plaintiff Continental from the Canadian market, dividing its former share between two of the defendants. The Court found:

> [T]here is no indication that the [Metals] Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped. . . . Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law. There is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.

Id. at 706-07. Since no act of the sovereign was involved in *Continental Ore* there is nothing in that case to disturb *American Banana's* holding on the act of state doctrine. It is simply not the law that merely because the action is based

on the antitrust laws, the act of state doctrine is to be discarded.[8]

VI

The appellants contend that the act of state doctrine cannot be applicable here because Libya is not named as a defendant, is not designated as a co-conspirator and in fact "was as much a victim of the conspiracy as was Hunt." Hence appellants inform us that we are not called upon here to sit in judgment upon the acts of Libya. Thus they argue that the third count of their complaint is not within any of the cases which have applied the doctrine. A similar argument was raised in *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), aff'd per curiam, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972) relied upon by Judge Weinfeld below as a case which involved facts substantially parallel to those in the instant case. 410 F. Supp. at 24. *Occidental* involved an alleged antitrust conspiracy to restrain and monopolize the exploration, development and exploitation of petroleum reserves in the territorial waters of the Trucial States. The defendants were accused, *inter alia*, of having procured and induced the Ruler of Sharjah for his personal gain to assert dominion over certain territory

8. Appellants also contend that *American Banana* is inapplicable because Hunt relies on not only the Sherman Act but also the Wilson Tariff Act which "was not in existence when *American Banana* was decided." Since the antitrust provision of the Wilson Tariff Act was initially enacted in 1894, Act of Aug. 27, 1894, c. 349, §73, 28 Stat. 570, in substantially the same language as appears presently, 15 U.S.C. §8, the argument is fallacious. In any event, this argument only relates to jurisdiction and does not affect the act of state issue. In so far as the substantive antitrust provisions of the Wilson Tariff Act are concerned, they follow the same pattern as the Sherman Act. *United States* v. *Cooper Corp.*, 312 U.S. 600, 608 (1941); see W. Fugate, Foreign Commerce and the Antitrust Laws §13.2 (2d ed. 1973).

within a concession area awarded to the plaintiffs by another Trucial State, Umm al Qaywayn. The plaintiffs in that case raised the same argument raised here—that they were complaining not of the acts of a foreign state but only of those of the named defendants in catalyzing them. However, the court indicated that the plaintiffs had characterized the foreign sovereigns there involved as co-conspirators, an appellation studiously avoided in the case before us. Moreover, in that case the plaintiffs would have been required to establish that Sharjah had issued a fraudulent territorial waters decree. 331 F. Supp. at 110. Here it is urged that Hunt makes no claim that Libya acted illegally at all, simply that as a matter of fact its "lawful" act was induced by the unlawful conduct of the named defendants.[9] While we agree that these points serve to distinguish *Occidental* from the case before us, the distinctions proffered are of no substance and do not affect the disposition of this case.

First: The excision of the government of Libya from the pleadings as a defendant or co-conspirator does not eliminate its action as a necessary element in the cause pleaded in the third claim. Hunt has pleaded that he was damaged as the result of Libyan action in cutting back his production and eventually nationalizing his properties.[10] It is well established that a private plaintiff who seeks damages in an antitrust action must allege and establish that his business or property was injured as a direct result of the Sherman Act violation. *Radiant Burners, Inc.* v.

9. *Occidental* in fact supports the holding below and the discussion here on the vitality of *American Banana*. Thus the court, while recognizing that the restrictive view of Mr. Justice Holmes in *American Banana* as to the territorial reach of the Sherman Act has not survived subsequent Supreme Court holdings, found that the act of state holding there applied has endured unscathed. 331 F. Supp. at 109-10.

10. ¶¶34, 40, 41 of the complaint.

Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961); *Salerno* v. *American League of Professional Baseball Clubs*, 429 F.2d 1003, 1004 (2d Cir. 1970), cert. denied, 400 U.S. 1001 (1971).

Appellants do not deny, as they cannot, this proposition of law. Instead, they argue that while Hunt must prove a causal connection between Libya's nationalization and the conspiracy charged this has been sufficiently pleaded and somehow this shields the third claim from dismissal prior to trial.[11] However, appellants admit that antitrust liability cannot be attributed to the defendants unless Hunt can prove that *but for* their combination or conspiracy Libya would not have moved against it. Since this nexus is at the heart of the claim we do not understand how Judge Weinfeld could have erred in anticipating that the doctrine of act of state was inescapably raised by the pleadings and thus was a major issue appropriately considered on the motion to dismiss.

Second: Appellants' argument that by their not challenging the propriety of Libya's action and by not asserting that Libya violated either international law or American antitrust law, the judicial branch of government is not required to sit in judgment of the act of the foreign

11. Appellants urge on appeal that the interpretation of the third claim below was unduly narrow since ¶63 of the complaint, *supra*, note 2, also charged that the defendants conspired to preserve the competitive advantage of Persian Gulf crude oil over that of Libyan and thus to diminish competition by preventing Hunt from reaching any agreement with the Libyan government inconsistent with that advantage. However, Hunt's first claim which alleges a conspiracy among the defendants in violation of both the Sherman and Wilson Tariff Acts states in ¶50(b) of the complaint that the major producers took steps to restrain competition by, "Negotiation and administration of the Libyan Producers' Agreement so as to disadvantage Libyan oil relative to Persian Gulf oil." That claim was not dismissed and Hunt is therefore not precluded from raising the issue at trial. Judge Weinfeld specifically found the act of state doctrine unavailable to the defendants on this count. 410 F. Supp. at 20-21.

sovereign is, upon analysis, superficial and not legally sufficient. It is true that traditional and textbook definitions of the act of state doctrine provide that courts in the United States are precluded from inquiring into the validity of the public acts of the foreign sovereign committed in its own territory. E.g., *Alfred Dunhill of London* v. *Republic of Cuba, supra,* 96 S. Ct. at 1863; *Frazier* v. *Foreign Bondholders Protective Council,* 283 App. Div. 3, 125 N.Y.S. 2d 900, 903 (1st Dept. 1953); W. Fugate, Foreign Commerce and the Antritrust Laws §2.21 at 81-82 (2d ed. 1973). However, while the skilled pleader here has meticulously attempted to avoid the issue of validity, its claim is admittedly not viable unless the judicial branch examines the motivation of the Libyan action and that inevitably involves its validity. Thus the State Department note of July 8, 1973 in response to the Libyan seizure of Hunt's properties after determining that the reasons for Libya's action were political reprisal against the United States government and economic coercion against other U.S. nationals in Libya concludes:

> Under established principles of international law, measures taken against the rights and property of foreign nationals which are arbitrary, discriminatory, or based on considerations of political reprisal and economic coercion are invalid and not entitled to recognition by other states.

A. Rovine, Digest of United States Practice in International Law 1973 at 335.

In sum, the United States has officially characterized the motivation of the Libyan government, the very issue which Hunt now seeks to adjudicate here. The attempted transmogrification of Libya from lion to lamb undertaken here does not succeed in evading the act of state doctrine because we cannot logically separate Libya's motivation

from the validity of its seizure. The American judiciary is being asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far reaching national concern.

Mr. Justice Harlan, in analyzing the act of state doctrine in *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 423, observed:

> It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

The *Dunhill* majority has reiterated this view:

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.

Alfred Dunhill of London v. *Republic of Cuba, supra,* 96 S. Ct. at 1863.

The act of state rubric then is perceived by the Supreme Court as a judicial articulation of the separation of powers doctrine and its application here is particularly appropriate since the executive branch has already determined the valid-

ity of the very act *sub judice* and has necessarily identified its motivation. Another inquiry could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the doctrine in issue.[12] Even if the Department of State had not spoken, the inquiry required by the third claim in this private litigation is hardly within the fact finding competency of the judicial branch.[13] Appellants claim that but for the conspiracy pleaded, Hunt's business would have continued to thrive and its properties would have remained unscathed and intact. This necessarily would require a wholesale examination of Libyan policy—how did it treat other companies, what provoked its "displeasure," how far could concessions by Hunt appease President al-Qadhafi.[14] The action taken

12. The importance of a unified national voice on foreign policy has been recognized since the founding of the republic. See The Federalist No. 42 (J. Madison). The judiciary, even when it has had jurisdiction, has traditionally been reluctant to infringe on the executive's authority in the area of foreign affairs. This has resulted in the application of the political question doctrine to find such issues non-justiciable. See *Baker* v. *Carr*, 369 U.S. 186, 211-13 (1962).

13. See *Holtzman* v. *Schlesinger*, 484 F. 2d 1307, 1310-11 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974), and *Mitchell* v. *Laird*, 488 F. 2d 611, 616 (D.C. Cir. 1973), which emphasize the difficulty of a judicial tribunal in making determinations of political and diplomatic dimensions in the arena of foreign affairs, an area entrusted to the discretion of the President and the Department of State.

14. Our dissenting brother parts company with us when we say that in order to prove their damages, plaintiffs will be required to establish the motivation for the Libyan expropriation and that this inevitably involves its validity. He further argues that Libya is shielded from antitrust liability. We agree that Libya cannot be guilty of a Sherman Act violation. This is certainly so here since it is not a party and, in any event, it could not be because it is not a person or corporation within the terms of the Act but a sovereign state. *Interamerican Refining Corp.* v. *Texaco Maracaibo, Inc.*,

(footnote continued on next page)

here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants. To dismiss this examination as an issue of fact and not of law and therefore beyond the ambit of the act of state doctrine is, in our view, neither conceptually nor pragmatically sound.

VII

Appellants urge finally, and perhaps ineluctably, that if the act of state doctrine as traditionally applied by the courts is found here applicable, it be redefined so that it would solely be utilized where a determination of the

307 F. Supp. 1291, 1298 (D. Del. 1970); Fugate, Antitrust Jurisdiction and Foreign Sovereignty, 49 Va. L. Rev. 925, 932 (1962); K. Brewster, Antitrust and American Business Abroad 94 (1958). (There is no claim here that Libya was performing a purely commercial act.) When we have discussed the "validity" of the act of confiscation we are not using the term in an antitrust sense but rather in an international law context. The plaintiffs admittedly can only succeed if they establish the motivation of Libya in making the seizure. The United States has characterized it as an act of political reprisal. We are now asked to determine that Libya would not have so acted had it not been for the conspiracy of the defendants. As recently indicated in *Timberlane Lumber Co.* v. *Bank of America*, —— F. 2d —— (74-2142, 74-2354, 74-2812, 9th Cir. Dec. 27, 1976), "We wish to avoid 'passing on the validity' of foreign acts. *Sabbatino*, 376 U.S. at 423. Similarly, we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action." See The Restatement, Second, Foreign Relations Law of the United States, §41 (1965), "[A] court in the United States . . . will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests."

The dissent also urges that Libya's authorization, approval, encouragement or participation in restrictive private conduct confers no antitrust immunity on the wrongdoer. But this is not a case of Libyan participation in antitrust wrongdoing. The complaint is rather that Libya like Hunt was a "victim" of the conspiracy.

legality of the foreign sovereign's action is the issue. As we have already discussed, the issue of legality cannot be isolated from the issue of motivation of the foreign sovereign. Appellants here have recognized and, indeed, cited the State Department position on the seizure of Hunt's properties. Counsel has argued that a reversal of *Sabbatino* by *Dunhill,* which at the time of the briefing of this appeal was pending before the Supreme Court, would enable this Court to examine the Libyan nationalization "uninhibited by the act of state doctrine." Appellants' reply brief at 16. But *Dunhill* has since been decided, Hunt is not within its purely commercial exception and *Sabbatino* remains unblemished, relied on and cited by both the majority and dissenting opinions. *Alfred Dunhill of London* v. *Republic of Cuba, supra,* 96 S. Ct. at 1866-67; id. at 1878 (Marshall, J., dissenting).

In *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 428, Mr. Justice Harlan demurred from establishing any inflexible or all-encompassing rule in act of state cases. A fortiori it is not for this inferior court to undertake the task. This is particularly so since our holding is compelled by the separation of powers underpinning of the doctrine. Furthermore, the distinction sought to be engrafted would, in effect, result not in the doctrine's redefinition but its extirpation, thus stripping the judiciary of an invaluable tool needed on occasion to ease the friction between the departments.

Appellants emphasize that the court below noted both in its decision on the pleadings and its certification of this appeal that the recent disclosures of bribes and payoffs by multi-national corporations to foreign officials warrant consideration in the public interest of the continued viability of the act of state doctrine. While we have already found that there was no abuse in the certification here on the grounds we have mentioned, *supra,* part I, we respectfully

disagree with the proposition that "scandalous payoffs" to foreign potentates or their janizaries provide any basis at all for reconsideration of the doctrine in this case. There is no allegation express or implied here that representatives of Libya were seduced or enticed in any manner by the payment of bribes or boodle to take the action complained about. On the contrary, as we have stated, Libya is depicted as the innocent dupe of a domestic conspiracy. This appeal therefore is not the proper vehicle for consideration of international commercial bribery in so far as it affects the act of state doctrine.

For all these reasons we affirm the dismissal of the third claim of the complaint.

Dissenting Opinion

VAN GRAAFEILAND, *Circuit Judge*, dissenting:

While I am far from convinced that plaintiffs, given the opportunity, would have been able to establish the cause of action which was dismissed, the possible precedential impact of the majority's opinion prompts me to briefly record my dissent.

The "classic" definition of the act of state doctrine, reiterated by the Supreme Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964) and *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972), is found in *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897), where the court said:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Despite the broad language of this accepted definition, the doctrine does not purport to set up a jurisdictional bar to judicial review. *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 309 (1918). Neither does it prohibit judicial scrutiny of the conduct of foreign officials. Indeed, the very assertion of an act of state defense requires the court to examine into the nature of the conduct complained of and its relationship to the foreign sovereign. *See Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976); *Banco de Espana* v. *Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940). Federal courts have not hesitated to receive evidence concerning the acts of foreign officials and the role played by American citizens in motivating such acts. *See, e.g., United States* v. *Lira*, 515 F.2d 68 (2d Cir.), *cert.*

denied, 423 U.S. 847 (1975); *United States* v. *Cotten*, 471 F.2d 744, 746 n. 4 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973); *Stonehill* v. *United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969). The proscription of the doctrine is against judicial determination of the validity of the acts of a foreign sovereign, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba, supra*, 425 U.S. at 697, 706; *Banco Nacional de Cuba* v. *Sabbatino, supra*, 376 U.S. at 428, and judicial redress of grievances predicated upon a finding of invalidity. *Underhill* v. *Hernandez, supra*, 168 U.S. at 252.

It is difficult to anticipate what plaintiffs' proof would have been in this case, because the district court dismissed their cause of action, under Fed. R. Civ. P. 12(b) (1), for failure to state a claim on which relief could be granted. However, plaintiffs' contention appears to be that the Libyan Producers' Agreement was used by the defendants to impose competitive disadvantages upon the independent oil producers and to prevent them from reaching an agreement with Libya which would have been adverse to the defendants' Persian Gulf interests. Plaintiffs argue that they were induced thereby to reject Libyan demands in order that defendants could negotiate more favorable terms for their Persian Gulf wells and that, because of defendants' illegal conduct, they were caused to take a position in their own dealing with Libya which resulted in the nationalization of their interests.

Although plaintiffs make no claim of wrongdoing upon the part of the Libyan government in effecting the expropriation of their property, my brothers reject this concession to Libyan sensibilities. They say that, in order to prove damages, plaintiffs will be required to establish the motivation for the Libyan expropriation and that this inevitably involves its validity. It is at this point that my brothers and I part company.

In *Cantor* v. *Detroit Edison Co.*, 44 U.S.L.W. 5357, 5361 (July 6, 1976), the Supreme Court made it clear that "state

authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity" upon the wrongdoer. The Court's citation of *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) indicates that this rule applies in both foreign and domestic states.[1] At the same time, the state itself is guilty of no wrongdoing under the Sherman Act because of the role which it plays. *Parker* v. *Brown*, 317 U.S. 341 (1943).

In the instant case, as Judge Mulligan correctly observes, plaintiffs have the burden of establishing causal relation between the private violations alleged and the injuries suffered. *Salerno* v. *American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).[2] However, under the teaching of *Cantor* and *Parker*, *supra*, plaintiffs' success in this effort does not entail a finding that the acts of the Libyan government were invalid.

In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 704, the Court rejected as erroneous the Court of Appeals' holding that "such efforts as appellants claim defendants took to persuade and influence the Canadian government" were not within the purview of the Sherman Act. The Court said that appellants' offer of proof on this issue "presented an issue for the jury's resolution as to whether the loss of Continental's Canadian business was occasioned by respondents' activities." *Id.* at 706.

1. The Court's reference to *Continental* as an example of state "participation" indicates that it reads its decision in *Continental* differently than do my brothers, who find no act of the sovereign to have been involved in that case.

2. In *Zenith Radio Corp* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9 (1969) the Court said:

> It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under §4.

The defendants in *Continental*, as in the instant case, relied upon *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909) to shield them from liability. Referring to *American Banana*, the Court said at 704:

> This Court there held that an antitrust plaintiff could not collect damages from a defendant who had allegedly influenced a foreign government to seize plaintiff's properties. But in the light of later cases in this Court respondent's reliance upon *American Banana* is misplaced.

I find appellees' reliance upon *American Banana* here to be equally misplaced. If the validity of the conduct of a foreign government is not placed in issue, its participation in the wrongdoing of individual defendants should not be permitted to screen the latter from accountability for their illegal acts.[3]

Domestic corporations play a variety of roles in the affairs of foreign nations, some of which may be forbidden under our laws. Where, as here, the wrong complained of is the role played rather than the possible political reaction thereto, I think it wrong to predicate an act of state defense upon the face of the pleadings. A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

I would reverse the order dismissing the third claim of the complaint.

3. In *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D.Calif. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), relied upon by the majority, the complaint alleged that the ruler of Sharjah, at the instigation of defendants, falsely asserted a claim to certain off-shore drilling areas not within its territorial waters. Since plaintiffs' claim was premised upon this assertion of wrongdoing and called into question the location of Sharjah's territorial boundaries, I find this case clearly distinguishable from the one before us.

Appendix B

Opinion of the United States District Court

Nelson Bunker Hunt, Plaintiff,

v.

Mobil Oil Corporation et al., Defendants

No. 75 Civ. 1160

United States District Court,
S. D. New York,
Nov. 5, 1975.

OPINION

EDWARD WEINFELD, District Judge.

Certain defendants (Mobil Oil Corporation, Texaco, Inc., Standard Oil Company of California, The British Petroleum Company, Ltd., Exxon Corporation, Gulf Oil Corporation, Occidental Petroleum Corporation, Grace Petroleum Corporation), excepting only defendants Shell Petroleum Company, Ltd. and Gelsenberg AG,[1] move to dismiss the first, second and third claims of the complaint, encompassing all of plaintiff's antitrust charges, for lack of subject matter jurisdiction and for failure to state claims upon which relief can be granted, pursuant to Rule 12(b)(1)[2] and (6) of the Federal Rules of Civil Procedure. The

1. The defendant Gelsenberg AG moved to dismiss the complaint for lack of in personam jurisdiction and for lack of proper service of process, which motion was denied.

2. The precise basis for the claim of lack of subject matter jurisdiction is not altogether clearly articulated by the defendants. Upon argument of the motion, counsel for defendants stated that both branches of the instant motion would be treated the same, to wit, as

(footnote continued on next page)

defendants also move to dismiss the fourth claim, which alleges a breach of contract, or for partial summary judgment thereon; alternatively, they seek an order pursuant to section 3 of the Federal Arbitration Act[3] staying all proceedings under the fourth claim pending arbitration thereof.

At the outset a preliminary observation is in order. The defendants' motion to dismiss is based solely upon the alleged deficiencies of plaintiff's complaint, to which is attached an agreement of the parties and related amendments and supplements. The movants, however, in somewhat discursive fashion, have directed part of their argument to the merits of plaintiff's claims. This makes it necessary to state, what ordinarily is accepted as hornbook law, that the merits of the claims set forth in the complaint are not at issue; that the allegations of the complaint are assumed to be true for the purposes of this motion;[4] further, that a complaint should not be dismissed

"failure to state a claim." In any event, the defendants' challenge for lack of subject matter jurisdiction is without substance. As the Court of Appeals indicated recently, in *Brault* v. *Town of Milton*, Docket No. 74-2370 (2d Cir., Aug. 22, 1975), "[s]ince plaintiff [has] drawn [his] complaint so as to seek recovery under the . . . laws of the United States, this court has jurisdiction to hear the case, even if the complaint ultimately fails to state a claim." In *Baker* v. *Carr*, 369 U.S. 186, 199, 82 S.Ct. 691, 700, 7 L.Ed.2d 663 (1962), the Supreme Court held that such a suit may be dismissed for want of jurisdiction of the subject matter only if the alleged claim under the federal statute is "'so attenuated and unsubstantial as to be absolutely devoid of merit' . . . or 'frivolous.' . . ." The plaintiff's complaint here does not fall within this narrow exception to the rule, originating in *Bell* v. *Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), that "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."

3. 9 U.S.C. §3.

4. *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 515-16, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 174-75, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965).

unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[5]

THE ANTITRUST CLAIMS

Plaintiff Hunt, who was engaged in oil production in Libya under a government concession, alleges three claims of violation of the antitrust laws by the defendants. In broad outline, he charges that prior to and in the course of cooperative efforts by plaintiff and defendants to deal with increasingly aggressive oil producing countries, defendants combined and conspired in violation of section 1 of the Sherman Act[6] and section 73 of the Wilson Tariff Act:[7]

Claim 1: to impose unlawful customer and market restrictions upon him by insisting he enter into an agreement, thereafter enforced, which limited the resale of Persian Gulf oil supplied to him by defendants only to his preexisting Western Hemisphere and European customers.

5. *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L. Ed.2d 80 (1957), *reaff'd, Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). *See also Prudential Ins. Co. of America* v. *Insurance Agents' Int'l Union (AFL-CIO)*, 169 F. Supp. 534, 536 (S.D.N.Y.1959).

6. 15 U.S.C. §1. This section reads as follows:

"Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

7. 15 U.S.C. §8. This section reads as follows:

"Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce . . . ."

Claim 2: to group boycott plaintiff by collectively refusing to deliver to him some ninety million barrels of oil rightfully due him under that agreement.

Claim 3: to use the agreement between the parties, as amended and extended, and their consequent control over the course of Libyan negotiations, to promote certain defendants' Persian Gulf interests at the expense of plaintiff and, ultimately, to destroy plaintiff by preventing him from reaching any agreement with the Libyan government, which course of action led to plaintiff's nationalization and elimination from competition as a producer of Libyan oil. Such concerted misuse of the parties' agreement was allegedly the continuance of an already existing conspiracy on the part of the defendant seven major oil companies[8] to eliminate plaintiff and other Libyan independents as competitors.

Preliminary to a detailed consideration of the defendants' challenge to these claims, a brief reference is desirable to the extended factual background against which the claims are alleged. The plaintiff's charges center about oil production in two areas, Libya and the Persian Gulf. Libya and the other oil producing countries are members of the Organization of Petroleum Exporting Countries ("OPEC"). The seven majors are vertically integrated.[9] Six of the seven produce oil in both areas, but the Persian Gulf fields are far more significant to them since this area contains ten times the oil in Libya. Plaintiff was a non-integrated independent producer who operated in Libya at exploration and production levels. Other independent

8. Mobil Oil Corporation, Exxon Corporation, Shell Petroleum Company, Ltd., Texaco, Inc., Standard Oil Company of California, The British Petroleum Company, Ltd. and Gulf Oil Corporation.

9. Their functions include the exploration for and production of crude oil, the refining of crude oil, the transportation of crude oil and of refined petroleum products, and the marketing of refined petroleum products.

producers of oil in Libya were Occidental Petroleum Corporation, Gelsenberg AG, a West German corporation, and Grace Petroleum Corporation, also named herein as defendants.

Plaintiff alleges that as production of oil in Libya by him and other independents increased substantially, the domination by the seven majors of world trade in crude oil was threatened, and that as the non-majors expanded their share of Libyan production, attempts were made as early as 1965 by one or more majors to eliminate cost advantages enjoyed by the non-majors' fast increasing Libyan production over the majors' Persian Gulf production.

In late 1969 Libya threateningly demanded changes in existing agreements with oil companies operating in Libya which increased the government's share or "take" in these companies' profits from such oil production. Libya's success in enforcing such terms in its 1970 agreements with all Libyan producers prompted the Persian Gulf countries to make similar demands on the companies operating in their territories. Following formulation of these Persian Gulf demands in December 1970, Libya, early in January 1971, despite recently concluded agreements, demanded new price and tax increases, particularly from plaintiff Hunt and from defendant Occidental, and gave them until January 16, 1971 to accept these "non-negotiable demands." Fearing a continuation of this pattern of escalating demands by Libya and then by Persian Gulf countries ("leapfrogging," as the parties term it), executives of the seven majors met secretly in January 1971 to concert their response to the latest demands of Libya, OPEC and the Persian Gulf members of OPEC.

Originally, the seven majors did not include plaintiff or any of the other Libyan independents in their conferences or plans to present a united front in resisting the demands of the oil producing countries, although their immediate

concern was the prospect of escalation of Persian Gulf countries' demands if either Hunt or Occidental agreed to Libya's new terms. The seven majors sought a clearance letter from the Department of Justice, but the Department insisted upon the inclusion of the independent Libyan oil producers as a condition of stating it had no present intention to bring an enforcement proceeding under the antitrust laws by reason of the contemplated concert of action by the seven majors. Plaintiff alleges that for this reason he and the other independents were belatedly invited to participate in the sessions. Plaintiff further alleges that another purpose of the seven majors in admitting Hunt and the other Libyan producers to their meetings was to obtain control over them in order to prevent any of them from accepting any terms laid down by Libya which might set an undesirable precedent for negotiations with the Persian Gulf countries, where the seven majors had their principal interest, or from otherwise acting in conflict with the interests of the seven majors.

Hunt alleges that at these meetings the parties resolved to present a united front in dealing with Libya and the other OPEC countries and despite his objections to some of the key features of the proposed agreement, he acquiesced based upon assurances by the parties that they would support him by supplying him with oil if his own supply were cut off by Libya. In any event, plaintiff and the defendants reached an agreement on January 15, 1971, referred to as the Libyan Producers' Agreement (the "Agreement"), which is at the core of this litigation.

The clear purpose of the Agreement, acknowledged by all the parties, was to deal collectively with the demands of Libya and the other oil producing countries. Each party to the Agreement declared his or its intention not to make any agreement or offer of agreement with the Libyan government with respect to the "government take" of

crude oil without the consent of the other parties, and to endeavor before making any agreement with the Libyan government to include a requirement that the Libyan government deal with the other concessionaires on comparable terms.[10]

A principal feature of the Agreement was its "sharing" provision. In general, the Agreement provided that if the party's crude oil production in Libya was cut back as a result of government action, all other parties would share in such cut back as provided in the Agreement. And if there was insufficient Libyan oil to meet the contractual obligations due to restrictions or shut down by the Libyan government, those parties with Persian Gulf production would supply the Libyan producers who were cut back with Persian Gulf oil at cost. However, this obligation was limited to supply such Persian Gulf oil only to meet commitments to preexisting European and Western Hemisphere customers.[11] Plaintiff Hunt had three such customers at that time, all of whom were signatories to the Agreement, and two of whom were among the seven majors (Exxon and Shell).

Plaintiff alleges that despite his objections to certain aspects of the Agreement, particularly to the preexisting customer and market restriction clause, he signed the Agreement for a number of reasons: the pressure of the January 16 deadline set by Libya for response to its latest "Non-negotiable" demands; the fact that industry-wide and OPEC-wide negotiations were preferable to individual negotiations with Libya; a misplaced confidence in the

10. However, ¶1 of the Agreement provides; "[N]othing . . . shall obligate any company to take or refrain from taking any action if to do so would, in its opinion, be contrary to its vital interests."

11. This preexisting customer provision did not apply to any Libyan oil supplied to a producer who had been cut back.

good faith and expressed intention of the other parties, and the fear that he would be boycotted if he refused to sign.[12]

THE FIRST ANTITRUST CLAIM

(a) *The preexisting customer provision.*

Plaintiff Hunt in essence charges that defendants, horizontal competitors of each other and of Hunt, violated the antitrust laws by the provision of the Agreement that imposed upon him a restriction against the resale of Persian Gulf oil to any other than a preexisting European or Western Hemisphere customer, with the purpose and intended effect of foreclosing him from competing with defendants for new customers or in new markets. He further charges that he was the only party to the Agreement without refining capacity of his own, which the parties knew; that he had only three eligible or preexisting customers, all of whom were parties to the Agreement; that the effect of confiining him to those customers was not only to foreclose him from seeking new customers wherever located, but also to enable the three to deal with him free from competitive forces and thus to extract from him wholly uncompetitive prices. Plaintiff contends that as a result of these acts and conduct of the defendants he sustained a loss of many millions of dollars.

On its face plaintiff's charge that the customer and market restrictions contained in the Agreement constituted a per se violation of the Sherman Act and the Wilson Tariff Act appears to be of substance under the Supreme Court

12. Plaintiff's consent to and participation in the Agreement of which he now complains does not prevent him from seeking the protection of the antitrust laws since the Supreme Court has held that "the doctrine of *in pari delicto* . . . is not to be recognized as a defense to an antitrust action." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 140, 88 S.Ct. 1981, 1985, 20 L.Ed. 2d 982 (1968). *See also Trebuhs Realty* v. *News Syndicate Co.*, 107 F.Supp. 595, 599-601 (S.D.N.Y.1952).

decisions in *United States* v. *Arnold, Schwinn & Co.*[13] and *United States* v. *Topco Associates, Inc.*[14] In sum, plaintiff's position is that no matter how well intentioned and whatever the defendants' motivation in seeking to protect themselves against the ever increasing demands of the oil producing countries, the provision of the Agreement which restricted plaintiff to preexisting customers and geographical territories, in effect, a regulation of customers to whom and where he could sell crude oil, constituted a per se violation which forecloses application of the rule of reason.[15]

However, the defendants challenge the very foundation of this antitrust claim by raising the threshold question of whether the agreement to provide Persian Gulf oil to the parties whose supply was cut off by Libya was truly an agreement for the sale and purchase of oil, or whether it was in effect an insurance or risk allocation mechanism which by its very nature did not entail a restraint of trade subject to the antitrust laws. Among other matters, they argue that the preexisting customer clause under which oil was supplied to plaintiff was not an agreement to buy or sell, but rather "a sharing in the loss arrangement," of special benefit to plaintiff, since he was one of the most vulnerable of the parties to attack by Libya. Accordingly, defendants contend that the preexisting customer clause attached to the oil supply provision is beyond the proscription of the Sherman Act. Whatever the force of this contention, it goes to the merits of the parties' respective positions. Thus the issue is not one to be decided on a motion to dismiss, since its resolution requires an interpretation of

13. 388 U.S. 365, 382, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967).

14. 405 U.S. 596, 607-11, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

15. *Cf. United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-11, 92 S.Ct. 1126 (1972).

the contract and the circumstances surrounding its execution.[16]

A matter of significance which would have to be considered is the so-called option to the Persian Gulf suppliers to pay cash in lieu of supplying oil. Under this provision, upon its face, the Persian Gulf producers who were "obligated to supply but [have] not supplied" such oil were permitted to pay cash to those Libyan producers whose supply had been cut off.[17] However, as the court noted at the argument of the motion to dismiss, this option provision "is rather clear except for one item at the end,"[18] which reads: "[E]ach of the Persian Gulf Producers Parties states its present intention is to supply Persian Gulf crude oil in discharge of its obligations under paragraphs 2(e) and 3." When questioned upon argument as to the meaning of that provision of the contract, counsel for the movants replied that it "has no meaning except an expression of intention which they [the Persian Gulf suppliers] were free to ignore at any time." Presumably its inclusion had some purpose;[19] otherwise if the Persian Gulf producers had "no

16. *Pekar* v. *Local No. 181 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO*, 311 F.2d 628, 636 (6th Cir. 1962); *Machen* v. *Johansson*, 174 F.Supp. 522, 527 (S.D.N.Y.1959); *Farrand Optical Co.* v. *United States*, 107 F.Supp. 93, 96 (SD.N.Y.1952).

17. Paragraph 4 of the Agreement provides in pertinent part:

"In respect of each barrel of Persian Gulf crude oil a party is obligated to supply but has not supplied under paraagraph 2(e) or 3:

(a) Such party shall have the option to elect to pay 10 cents; provided if such option is elected it shall apply pro rata as to every party to whom such Persian Gulf Producing Party has such an obligation."

18. Transcript of hearing, July 15, 1975, p. 79.

19. *National Equip. Rental Ltd.* v. *Reagin*, 338 F.2d 759, 762-63 (2d Cir. 1964). *See also Hanley* v. *James McHugh Const. Co.*, 444 F.2d 1006, 1009 (7th Cir. 1971); *United States* v. *N. A. Degerstrom, Inc.*, 408 F.2d 1130, 1133 (9th Cir. 1969).

present intention . . . to supply Persian Gulf crude oil in discharge" of their obligations, a substantial question of fraud may come into play.[20]

The plaintiff, in the light of this and other provisions and circumstances surrounding the making of the Agreement, disputes defendants' position that the parties intended the option to pay cash to be a complete alternative, unlimited in scope or duration, to supplying oil. Apart from these contentions, plaintiff points to the fact that the supply clause also provides that the exercise of the option must apply pro rata to every party to whom the Persian Gulf parties owe oil, and if they supplied oil to one obligee, they were without power to enforce a cash option provision against another obligee. Moreover, the payment of cash instead of supplying oil could, in the instance of the plaintiff, whose supply of Libyan oil was completely cut off, effectively eliminate him as a competitor in the crude oil market. Thus, the defendants' contention that the plaintiff's first claim is beyond the reach of the antitrust laws involves questions of fact which cannot be resolved on a motion to dismiss for failure to state a claim.[21]

The defendants, assuming arguendo that the Agreement at issue is covered by the Sherman Act, make a further attack upon plaintiff's first claim (as well as his other antitrust claims) upon a variety of grounds.

20. *Deyo* v. *Hudson*, 225 N.Y. 602, 611-12, 122 N.E. 635 (1919); *Adams* v. *Gillig*, 199 N.Y. 314, 319-22, 92 N.E. 670 (1910). *See also Schenley Distillers Corp.* v. *Renken*, 34 F.Supp. 678, 680-82 (E.D.S.C.1940); *Terris* v. *Cumminskey*, 11 A.D.2d 259, 261, 203 N.Y.S.2d 445 (3d Dep't 1960); *Sabo* v. *Delman*, 3 N.Y.2d 155, 160, 164 N.Y.S.2d 714, 143 N.E.2d 906 (1957).

21. *Wolman* v. *Tose*, 467 F.2d 29, 35 (4th Cir. 1972); *Wilshire Oil Co. of Texas* v. *Riffe*, 409 F.2d 1277, 1284 (10th Cir. 1969); *Zell Ins. Agency, Inc.* v. *Guaranty Security Ins. Co.*, 399 F.2d 147, 148-49 (5th Cir. 1968); *Dobson* v. *Masonite Corp.*, 359 F.2d 921, 923-24 (5th Cir. 1966).

(b) *The "target area" argument.*

Preliminarily, defendants urge that plaintiff lacks standing to raise any of his antitrust claims because he cannot, as required by the court in *Billy Baxter, Inc.* v. *The Coca-Cola Company*,[22] "allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target area' of the defendant's illegal act."

In view of the fact that plaintiff was in direct competition with the defendants,[23] their contention is somewhat difficult to understand. To equate plaintiff's position to one whose alleged injury could be regarded only as "remote," "incidental" or "consequential" rather than "direct"[24] is to disregard the reality of the relationship of the parties and the allegations of the complaint. It is true, as defendants argue, that the "target" or objective of the collective efforts of the defendants was not the plaintiff, but rather the oil producing countries, as manifested by defendants' united front. However, plaintiff certainly was within the "target area" of the oil supply provision of their agreement, which is the crux of his first cause of action. Indeed, according to his claim as a competitor he was in the direct line of fire. Specifically, under his version of the facts, plaintiff charges that the preexisting customer clause was

22. 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 877, 20 L.Ed. 2d 826 (1971).

23. *Cf. Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972), where our Court of Appeals stated: "this court has committed itself to the principle that in order to have 'standing' to sue for treble damages under §4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, *such as a competitor of the persons sued.*" (emphasis supplied.)

24. *Cf. Data Digests, Inc.* v. *Standard & Poor's Corp.*, 43 F.R.D. 386, 387 (S.D.N.Y.1967).

imposed not only over his protest, but was intentionally directed toward him for the very purpose of impairing his existing relationship with his customers and eliminating him from competition, causing him direct losses. Since plaintiff was not merely "incidentally" or "remotely" affected by this provision of the Libyan Producers Agreement, as, for instance one of his customers or creditors might have been, the defendants' reliance upon the recently decided *Long Island Lighting Company* v. *Standard Oil Company of California* and *Consolidated Edison Company of New York* v. *Standard Oil Company of California*[25] is misplaced.

Defendants' related attack for lack of direct causal connection between their alleged unlawful conduct and plaintiff's claimed injury likewise must fail. Apart from the fact that the complaint does plead, in instance after instance, that plaintiff was damaged in that the preexisting customer restriction foreclosed him from new customer and geographical markets, he charges that his existing customers, aided by other defendants and as part of their conspiratorial purpose, exploited the restrictions to force uncompetitive prices upon him, causing him to sustain losses in the millions. In any event, as this court has held, "the causation issue should not be resolved at this [pleading] stage of the action."[26]

(c) *The alleged inapplicability of the antitrust laws.*

Here the defendants contend that the antitrust laws were never intended to apply to American companies in their dealings with a foreign government acting in its sovereign capacity. They rely upon the doctrine originally articulated in *Eastern Railroad Presidents Conference* v. *Noerr Motor

25. 521 F.2d 1269 (2d Cir. 1975).

26. *Data Digests* v. *Standard & Poor's Corp.*, 43 F.R.D. 386, 388 (S.D.N.Y.1967).

Freight, Inc.,[27] and further elucidated in *United Mine Workers of America* v. *Pennington*,[28] that:

> "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[29]

The so-called *Noerr-Pennington* doctrine is founded upon the individual's constitutional right of petition under the First Amendment and upon the corresponding concern that the representatives in the legislature retain access to the opinions of their constituents, unhampered by collateral regulation.[30] These interests are not present in plaintiff's first claim, since his primary concern is not with any action on the part of defendants to procure passage or enforcement of any law, but rather with the clause of the Agreement which contains the customer and market restriction which is a strictly "private commercial activity" expressly excluded from the immunity of *Noerr-Pennington* by the Court in *Continental Ore Company* v. *Union Carbide & Carbon Corporation*.[31]

(d) *The act of state doctrine.*

Defendants also urge that plaintiff's first claim, as well as his two other antitrust claims, are foreclosed by the act of state doctrine. This doctrine was originated in *Under-*

27. 365 U.S. 127, 136, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

28. 381 U.S. 657, 669-70, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

29. *Eastern R. R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S.Ct. 523, 529 (1961).

30. *Id.* 137-38, 81 S.Ct. 523.

31. 370 U.S. 690, 707, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

hill v. *Hernandez*,[32] and precludes judicial inquiry into the public acts of a foreign government within that sovereign's own territory. It is based on "[c]onsiderations of comity, and of the highest expediency," and particularly on the notion that "[i]t would be not only offensive and unnecessary, but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states."[33] The doctrine has been held by the Supreme Court to bar a claim for antitrust injury flowing from a sovereign's acts which were induced by or procured by the defendant in the action.[34] However, the concept has no bearing on plaintiff's first claim because resolution of the issues raised thereunder does not in any way require an inquiry into the judgment, the conduct or acts of the Libyan government, or any alleged conduct by the defendants which allegedly induced action by the Libyan government.[35] Rather, inquiry would be confined to the preexisting customer restriction contained in the parties' Agreement.[36]

Once again, defendants, by concentrating on the broad purposes of the Libyan Producers' Agreement to present

32. 65 F. 577, 579 (2d Cir. 1895), *aff'd*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897).

33. *Id.* 579.

34. *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357-58, 29 S.Ct. 511, 53 L.Ed. 826 (1909).

35. *Cf. Occidental Pet. Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92, 110 (C.D.Cal.1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972).

36. Insofar as plaintiff's first claim raises the issue of the manipulation of Libyan tax laws by the seven majors, or any one of them, this reference is clearly for the purpose of setting a background and is not relied on by plaintiff to prove his claim of unlawful restriction of markets and customers.

a united front in meeting the ever increasing demands of Libya and the other oil producing countries, disregard that plaintiff's first claim is premised entirely under the particular provision of the Agreement which limits his resale of oil received from Persian Gulf producer defendants to particular markets and customers. That provision does not involve any question of Libyan conduct. At issue is the restriction contained therein and not the governmental acts of a foreign sovereign. Thus, the act of state doctrine is unavailable on defendants' motion to dismiss the first claim.

(e) *The "ancillary restraint" doctrine.*

In substance the defendants repeat and emphasize their contention that the Agreement, unlike the ordinary agreement for the purchase and sale of crude oil, was in effect a mutual assistance pact which served as protection for a Libyan producer whose production was cut back; that a preexisting customer was a condition precedent for such a Libyan producer to obtain Persian Gulf oil, which measured the obligation of the Persian Gulf producers to supply oil and limited their liability thereunder. Accordingly, defendants urge that the preexisting customer clause is ancillary to the Libyan Producers' Agreement and is reasonably necessary to the goals of that Agreement. This argument perforce acknowledges that restraints are imposed, but even so, the defendants contend they are reasonable and immune from antitrust attack because they fall within the protection of the "ancillary restraint" doctrine. This concept, first articulated in *United States* v. *Addyston Pipe & Steel Co.*,[37] recognizes such a defense where the restraint is "merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the le-

37. 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899).

gitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."

The plaintiff responds that defendants' ancillary restraint contention is flawed in several respects. First, he argues that the preexisting customer clause, with its customer and territorial restraints, is unlawful per se, which renders the doctrine inapplicable in the light of *United States* v. *Arnold, Schwinn & Co.*[38] Plaintiff, further argues that the doctrine is unavailable to defendants since it presupposes the existence of a lawful contract. Plaintiff claims the Libyan Producers' Agreement was forced upon him by the seven majors in furtherance and continuance of a preconceived anti-competitive purpose and thus is unlawful.

Next, he argues that even assuming a lawful contract, the restraint was neither reasonable nor necessary since it went far beyond what was required for the protection of the Persian Gulf producers insofar as they were obligated to supply oil. The defendants contend that it was reasonably necessary in order to limit the Persian Gulf producers' risk as obligors under the oil supply provision. These differing contentions present an issue of fact which must await trial.

THE SECOND ANTITRUST CLAIM

Under his second claim, plaintiff alleges that since at least 1970 the defendants and others engaged in a combination or conspiracy in violation of the antitrust laws;[39] that as part of their unlawful conduct, and acting in concert, they conspired to and did withhold ninety million barrels of crude oil to him under the Libyan Producers' Agreement; that they agreed to boycott him to deprive him of crude oil

38. 388 U.S. 365, 380-82, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1966). *See United States* v. *Glaxo Group Ltd.*, 302 F.Supp. 1, 10-11 (D.D.C.1969), *rev'd on other grounds*, 410 U.S. 52, 93 S.Ct. 861, 35 L.Ed.2d 104 (1973).

39. 15 U.S.C. §§1, 8.

needed to fulfill his contracts with his customers. He further alleges that as a result of such group action he not only lost profits he would have made on the resale of the withheld oil, but also lost his existing contracts, opportunities for their renewal and access to new customers and markets; and finally that he was eliminated as a source of crude oil in the world crude oil market.

The defendants seek dismissal of this antitrust claim upon the same grounds, among others, which were advanced against the first claim. Substantially the same analysis which required rejection of those objections directs a similar result as to this claim. Thus, defendants advance the "target area," "act of state doctrine," and inapplicability of the antitrust laws, as well as other objections. Again defendants consider the Libyan Producers' Agreement only in its overall function to present a united front against OPEC countries, but ignore the specific provision of that Agreement upon which plaintiff centers his charge of antitrust activity by defendants. Here plaintiff is contesting the defendants' use or abuse of the oil supply provision as an instrument to further a conspiracy to eliminate him as a competitor, which he alleges was in existence before the Agreement was executed.

Plaintiff, as in the first claim, is directly in the "target area" of this clause so that he has standing to charge that defendants' "refusal to deal" and the "group boycott," which also constituted a breach of the terms of their Agreement, were with the intent and effect of harming him. Plaintiff's "act of state" contention and the inapplicability of the antitrust laws, based upon the *Noerr-Pennington*[40] doctrine is as misdirected to this claim as it was to the first claim. Consideration of the supply provision of the Agree-

40. *Eastern R. R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 669-70, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

ment and its claimed breach in furtherance of the defendants' alleged purpose to eliminate him as a competitor does not require inquiry into the acts of Libya or any other foreign state.

Defendants further contend, as they did under the first claim, that the oil supply provision is not a contract for the sale of oil, but merely an insurance or mutual help mechanism which does not impose an unreasonable restraint and thus is not subject to antitrust attack. But again, the validity of this contention centers about questions of fact as to this aspect of the Agreement, resolution of which is foreclosed on a motion to dismiss for failure to state a claim.

Defendants raise an additional objection to the second antitrust claim. They assert that this claim is one for breach of contract for failure to deliver a balance of ninety million barrels of crude oil under the Libyan Producers' Agreement, which does not give rise to an antitrust claim. But again defendants ignore the allegations of the complaint, which go much beyond a charge that each defendant reneged on its commitment to the plaintiff. The defendants' contention that plaintiff "was denied access to oil by action of the Libyan government, not the defendants,"[41] is simplistic. It is true that the nationalization of Hunt's concession by Libya deprived him of an oil supply, but in that event the defendants agreed to supply him with Libyan oil, and if that were unavailable, with Persian Gulf oil to meet commitments to his existing customers. Hunt's specific claim is that the Persian Gulf defendants, acting in concert with others, failed to live up to that obligation; that the withholding of the ninety million barrels due him was encompassed within the alleged conspiracy to boycott him and eliminate him as a competitor.

Whether plaintiff can support his charges and show that a group boycott existed, and that its nature and extent was

41. Reply memorandum p. 7.

such as to constitute a violation of the Sherman Act, presents an issue of fact, the resolution of which must await another day.

For all the above reasons, the defendants' motion to dismiss the first and second claims must be denied.

THE THIRD ANTITRUST CLAIM

In this instance, too, plaintiff alleges that at least since 1970 the seven majors, along with others, named and unnamed, conspired or combined in violation of the Sherman Act and Wilson Tariff Act to preserve the competitive advantage of Persian Gulf crude oil relative to that of Libyan crude oil and to diminish competition from Libyan oil producers; that to effect this purpose they conspired to prevent plaintiff Hunt and other Libyan producers from reaching an agreement with the Libyan government inconsistent with this competitive advantage; that in furtherance thereof, after obtaining Hunt's consent to the Libyan Producers' Agreement, which contemplated united front negotiations with Libya and other OPEC countries, the seven majors abandoned the agreed upon collective policy and manipulated the course of the Libyan negotiations so as to advance their own interests to the detriment of Hunt; and generally that the defendants deliberately pursued a course of action which led to the nationalization of Hunt's concession in Libya and his elimination as a Libyan crude oil producer.

In the light of plaintiff's aforesaid charges, the defendants' "act of state" plea rests on a solid foundation. The manipulative course of conduct attributed to the seven majors following the signing of the Libyan Producers' Agreement centers about negotiations and dealings with, and action thereafter taken by, the Libyan government. Hunt charges that in consequence he was forced to enter into arrangements with the Libyan government that were detri-

mental to him and beneficial to the seven majors; his personnel were evicted by Libya from the Sarir Field upon his refusal, induced by the seven majors, to market British Petroleum's production from its half of the Sarir Field[42] which Libya had nationalized; his oil production was cut back fifty per cent by Libya; his right to produce and export oil was terminated, following his resistance, again based upon defendants' inducement, to Libya's demand for increased equity participation in his interests in Sarir; finally, all his assets were nationalized by Libya. The aforesaid claimed consequences of defendants' manipulative course of action all involve acts of the Libyan government which appear to be within the proscription of the act of state doctrine.

But Hunt seeks to avoid the impact of this doctrine upon several grounds. First, he argues the third claim "challenges no act by the Libyan government, and does not ask this Court to sit in judgment on the acts of a sovereign state. As pleaded, the wrong done to Hunt was caused prior to any act by the Libyan government, for it was caused when the defendants entered into a conspiracy to advance their own Persian Gulf interests at his expense and to eliminate him from the industry." Although it may be, as plaintiff asserts, that the alleged conspiracy originated late in 1970, the acts and conduct of the defendants in furtherance thereof were committed after the signing of the Agreement in January 1971. True, inquiry may be properly directed to the acts and conduct of the seven majors and their codefendants, allegedly constituting their manipulative course of action. But the matter does not end there. To establish his claim plaintiff would have to show that such acts and conduct were a material cause of

42. Hunt had the concession on the other half.

his alleged damage;[43] that but for defendants' conspiratorial manipulative activities the Libyan government would not have cut back his production, shut off his oil supply completely and then nationalized his properties. This clearly would require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions.

In *Occidental Petroleum Corporation* v. *Buttes Gas & Oil Co.,*[44] the facts of which substantially parallel those of the instant case, plaintiff charged that the defendant had "induced and procured" various foreign governmental authorities to do certain executive acts which deprived plaintiff of its concession for oil production. The court found that the act of state doctrine, as set forth in *American Banana Company* v. *United Fruit Company,*[45] was the "relevant and dispositive principle."[46] The court specifi-

43. *Winckler & Smith Citrus Prods. Co.* v. *Sunkist Growers, Inc.*, 346 F.2d 1012, 1014 n. 1 (9th Cir.), *cert. denied,* 382 U.S. 958, 86 S.Ct. 433, 15 L.Ed.2d 362 (1965). *See also Credit Bureau Reports, Inc.* v. *Retail Credit Co.*, 476 F.2d 989, 992 (5th Cir. 1973); *Sam S. Goldstein Indus., Inc.* v. *Botany Indus., Inc.*, 301 F.Supp. 728, 733-34 (S.D.N.Y.1969); *National Auto Brokers Corp.* v. *General Motors Corp.*, 60 F.R.D. 476, 489-90 (S.D.N.Y.1973). Thus, the Supreme Court, in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660, 81 S.Ct. 365, 5 L.Ed.2d 358 (1960), indicated that, in a private treble damage action under §1 of the Sherman Act, plaintiff must adequately allege that he was "damaged" by the violation of the Act.

44. 331 F.Supp. 92, 107 (C.D.Cal.1971), *aff'd per curiam,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972).

45. 160 F. 184 (C.C.S.D.N.Y.), *aff"d,* 166 F. 261 (2d Cir. 1908), *aff'd,* 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed 826 (1909).

46. *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92, 108 (C.D.Cal.1971), *aff'd per curiam,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972).

cally considered the contention, heavily relied upon by Hunt here, that the doctrine was inapplicable because plaintiffs were not complaining "of the acts of foreign states set forth in the complaint, but rather only of the defendants' conduct in 'catalyzing' those acts."[47] As a major item in rejecting plaintiffs' efforts to avoid the impact of the act of state doctrine, the court stated that "[b]ecause a private antitrust claim requires proof of damage resulting from forbiden conduct . . . plaintiffs necessarily ask this court to 'sit in judgment' upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators."[48] The court followed *American Banana* and granted the defendants' motion to dismiss. Here the operative facts are even more strikingly similar to *American Banana* than they were in *Occidental*, since the foreign act of state complained of in *American Banana* was the nationalization of plaintiffs' production facilities.

Next, plaintiff urges that the Supreme Court, in *United States* v. *Sisal Sales Corp.*[49] and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*,[50] created an exception to *American Banana*, which applies to his third claim. In *Sisal*, the Court explicitly distinguished *American Banana* on the ground that the conspiracy in *Sisal* was "made effective by acts done" within the United States and thus was not "'[a] conspiracy in this country to do acts in another jurisdiction,'"[51] as was the case in *American Banana* and is the case presently before this court. In *Continental Ore*, the Court rested its decision on similar grounds, but

47. *Id.* 110.

48. *Id.*

49. 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1927).

50. 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

51. *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 276, 47 S.Ct. 592, 593, 71 L.Ed. 1042 (1927).

also emphasized that no "official within the structure of the Canadian Government"[52] was involved.

It may well be that recent public disclosure of the dealings of multi-national corporations with foreign governments which have an adverse impact upon American interests justifies a reappraisal of the act of state doctrine to determine whether its scope should be confined. However, in the absence of new doctrinal trends in Supreme Court opinions, reassessment of the range of the doctrine must rest with that Court and not this court.[53] Accordingly, the defendants motion to dismiss the third claim is granted.

THE BREACH OF CONTRACT CLAIM

Plaintiff alleges that defendants breached the Libyan Producers' Agreement by failing to supply him with ninety million barrels of Libyan and/or Persian Gulf crude oil due to him thereunder, and as a result he sustained damages of at least ninety million dollars.

All defendants move to stay all proceedings with respect to the breach of contract claim pending arbitration pursuant to the arbitration provision in the Agreement.[54]

52. 370 U.S. 690, 706, 82 S.Ct. 1404, 1414, 8 L.Ed.2d 777 (1962).

53. *Cf. United States* v. *Ullmann*, 221 F.2d 761-62 (2d Cir. 1955), *aff'd*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956). *See also Booster Lodge No. 405, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO* v. *National Labor Relations Bd.*, 148 U.S. App.D.C. 119, 459 F.2d 1143, 1150 n. 7 (1972); *United States Gypsum Co.* v. *United Steelworkers of America*, 384 F.2d 38, 44 (5th Cir. 1967), *cert. denied*, 389 U.S. 1042, 88 S.Ct. 783, 19 L.Ed.2d 832 (1968); *United States* v. *Finazzo*, 288 F.2d 175, 177 (6th Cir. 1961); *G. I. Distributors, Inc.* v. *Murphy*, 336 F.Supp. 1036, 1037 (S.D.N.Y. 1972).

54. Paragraph 9(d) of the Agreement reads as follows: "Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration . . . ."

However, only one defendant, Texaco, has served a demand that the claim be submitted to arbitration. Thereupon plaintiff moved to stay Texaco's proposed arbitration pending determination of his antitrust claims, now reduced to two. That the fourth claim is subject to arbitration under the Agreement is beyond dispute. The issue, however, is whether that claim should be submitted to arbitrators for their determination at the same time that plaintiff's antitrust claims go forward in this court for judicial determination.

It is now cardinal doctrine that the public interest in the enforcement of the antitrust laws makes antitrust claims inappropriate subjects for arbitration.[55] As a corollary, a stay of antitrust judicial proceedings in favor of arbitration will not be granted where the arbitrators would be required to consider antitrust issues with respect to the controversy to be determined by them.[56] Thus the precise question presented by the respective motions is whether the antitrust issues so permeate the entire case that it would not be "easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues."[57]

The defendants argue that the arbitrator would not be required to resolve the antitrust claims and, by way of example, add "if questions were to arise as to the meaning of particular words or clauses in the contract, an arbitrator would be able to determine these matters without delving

55. *American Safety Equip. Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821, 827-28 (2d Cir. 1968). *See also Cobb* v. *Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *Helfenbein* v. *International Indus., Inc.*, 438 F.2d 1068, 1070 (8th Cir.), *cert. denied*, 404 U.S. 872, 92 S.Ct. 63, 30 L.Ed.2d 115 (1971); *A. & E. Plastik Pak Co.* v. *Monsanto Co.*, 396 F.2d 710, 715-16 (9th Cir. 1968).

56. *American Safety Equip. Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968).

57. *Cobb* v. *Lewis*, 488 F.2d 41, 50 (5th Cir. 1974).

into antitrust issues." But the meaning of particular words or clauses in the contract is included among other issues the court would have to consider under the first and second antitrust claims.

The alleged breach of contract is an essential ingredient of plaintiff's second antitrust claim. The hard thrust of plaintiff's charge is that the withholding of ninety million barrels of oil due him under the supply provision was not only a breach of the Agreement, but also a concerted refusal to deal with him and a group boycott in furtherance of the conspiracy to eliminate him as a competitor. Thus what is at issue is not a mere breach of contract, which to be sure is within the competence of an arbitrator's determination and by itself, if isolated, would not involve antitrust issues. However, the court will have to decide whether a breach of the oil supply provision occurred, and if so, whether it was committed by defendants individually or acting in concert and with the purpose and intent of eliminating him or injuring him as a competitor.

Also at issue are the parties' conflicting positions as to the option clause under the oil supply provision. The defendants contend that the option clause gave them an absolute, unrestricted right to pay cash instead of supplying oil. Obviously this would be advanced as a defense in the arbitration. Plaintiff's differing version that the payment of cash could not be used to freeze him out of oil to which he was entitled, and thereby to eliminate him as a competitor, is a central issue under the antitrust charge.

It is unrealistic to assert, as defendants do, that the breach of contract claim can be isolated so that the arbitrator can decide the issues thereunder without inquiry into matters that are material to the antitrust claims. The breach of contract and antitrust claims are so inextricably interrelated, one with the other, that it would not be easy, in the light of the parties' contentions, for the arbitrators to avoid wandering into the thicket of complex antitrust issues.

If anything, Texaco's demand for arbitration demonstrates that its purpose indeed is to have the arbitrator consider plaintiff's antitrust claims. The commencement of this very lawsuit and the assertion of the antitrust claims[58] are alleged by Texaco to constitute a breach of contract by Hunt, which Texaco asserts is arbitrable and which it seeks to submit to the arbitrator. Such a submission would require lay arbitrators to delve into whether or not the antitrust claims were foreclosed by the parties' Agreement.[59] Texaco argues that Hunt violated the Agreement by commencing this antitrust suit. The argument proceeds:

> "The issue before the arbitrators is not whether Hunt's customer provision claim may go forward.

58. The second dispute presented by Texaco's demand is the following:

> "2. You have breached the promise you made in the contract which induced Texaco to enter into the contract with you and upon which Texaco relied in conferring valuable benefits to you thereunder. The contract contains the following essential promise:
>
> 'Each party hereto covenants that it will not assert any claim against any other party or parties arising out of this agreement, except claims for non-performance of this agreement.'
>
> In *your aforementioned lawsuit,* [this action] you purport to assert claims against Texaco arising out of the contract for other than its non-performance, thereby breaching your covenant and depriving Texaco of the consideration for the valuable benefits Texaco delivered to you pursuant to the contract." (emphasis supplied.)

59. An agreement to waive future antitrust violations would be contrary to public policy. *Gaines* v. *Carollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967); *Fox Midwest Theatres, Inc.* v. *Means,* 221 F.2d 173, 180 (8th Cir. 1955); *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 39 F.Supp. 117, 119 (S.D.N.Y. 1941), *aff'd,* 135 F.2d 844 (2d Cir. 1943). On the other hand, the Court of Appeals has held that arbitration of antitrust claims is "proper . . . [when] the agreement to arbitrate was made after the dispute arose." *Coenen* v. *R. W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2d Cir.), *cert. denied,* 406 U.S. 949, 92 S.Ct. 2045, 32 L.Ed.2d 337 (1972). *See also Cobb* v. *Lewis,* 488 F.2d 41, 48 (5th Cir. 1974).

> That unquestionably is a matter to be determined by this Court. Nor, of course, will the arbitrators be asked to determine the legality of the customer provision.
>
> "The question the arbitrators will have is whether someone may scheme to exact property from another by promising not to bring a potential claim and, once the property is given to him in reliance on his promise, turn around and bring the claim anyway and still retain the benefits of his broken promise."

We are not prepared to apply an Alice in Wonderland meaning to this language. It so manifestly indicates that Texaco does intend to present to and have the arbitrators pass upon the issues which are the very essence of one of plaintiff's antitrust claims that one wonders the argument was advanced.

Accordingly, the plaintiff's cross-motion for a stay of Texaco's proposed arbitration of the breach of contract claim is granted; the motion by the other defendants for a stay of proceedings of the fourth claim in this action is granted except insofar as the breach of contract claim alleged therein is relevant and pertinent under the first and second antitrust claims; further, those defendants, as well as Texaco, are stayed from proceeding to arbitration as to the breach of contract claim until the final determination of this action.

Since the fourth claim is the subject of a stay both in this action and in arbitration, it is unnecessary to pass upon the alternative motion for its dismissal or partial summary judgment thereon.

In conclusion, the defendants' motion to dismiss is denied as to the first and second claims; granted as to the third claim; and the respective motions as to the fourth claim are disposed of as indicated.

Appendix C

Judgment of the United States Court of Appeals

[LETTERHEAD OF]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 10007

A. DANIEL FUSARO
Clerk

Please refer to this Court's Docket Number in all matters

Jan. 12, 1977

Docket No. 76-7052

NELSON BUNKER HUNT, ETC.,

vs.

MOBIL OIL CORP., ETC.,

Dear Sirs:

The Court has today handed down a decision in the above entitled cause affirmed the decision of the district court.

A copy of the opinion will be mailed to you tomorrow.

Additional copies of opinions may be obtained from this office in accordance with §0.17(7) of the rules of this Court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39(c) F.R.A.P. requiring the itemized and verified bill of costs, if any, to be filed within 14 days after entry of judgment, with proof of service.

Very truly yours,

A. Daniel Fusaro
Clerk

Address all inquiries to
Ms. Brullo
(212) 791-0100

Appendix D

Opinion of the United States District Court Directing the Entry of Judgment Pursuant to Rule 54(b)

75 Civil 1160

Familiarity is assumed with this court's opinion and decision which denied certain defendants' motions to dismiss plaintiff's first and second antitrust claims, but granted dismissal of his third antitrust claim, without leave to replead. Plaintiff now moves, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, for an order directing the entry of final judgment dismissing that claim upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The immediate motion centers about various contentions made by defendants with respect to the "act of state" doctrine in support of their motions to dismiss plaintiff's complaint. This court was of the view that issues raised as to the first and second antitrust claims could be determined without reference to or application of the "act of state" doctrine. However, as to the third claim, the conduct attributed to defendants appeared to bring that doctrine into play and consequently dismissal of that claim was required. In granting the dismissal, the court observed that recent public disclosures indicated the desirability of a reassessment of the "act of state" doctrine, but in the absence of doctrinal trends the matter was for consideration by higher authority and not by the district court.

Since the filing of the court's opinion on November 5, 1975, there have been further public disclosures of dealings of multi-national corporations with foreign governments, including payments to influence action of such governments or their officials which have an adverse impact upon American interests and concerns. The current exposures warrant consideration in the public interest of the continued viability of the "act of state" doctrine, which, if modified in any respect, may have a direct and significant bearing upon plaintiff's third claim. Moreover, any change may affect plaintiff's first two claims since defendants also rely upon that doctrine in resisting them.

Where plaintiff's instant motion under Rule 54(b) denied, and thereafter in the event of any appeal from any judgment entered with respect to plaintiff's first two claims, were this court's dismissal upon appellate review as to the third claim reversed, it would mean another long trial, as is forecast on the remaining claims. This would require a duplicative trial and additional but unnecessary expense to the parties.

Finally, an appeal, which it is assumed will be prosecuted expeditiously, would in no way delay the prospective trial of the claims that remain since, in view of the extensive discovery which the parties are now engaged in, the case will not be ready for trial until the fall at the earliest—this, apart from the court's other trial commitments; and clearly an appeal would not, at least it should not, interfere with the discovery process.

The motion for an order under Rule 54(b) is granted upon the express condition that the appeal be prosecuted with dispatch.

Dated: New York, N. Y.
January 22, 1976

/s/ Edward Weinfeld

United States District Judge

Appendix E

Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1160 (EW)

NELSON BUNKER HUNT, W. HERBERT HUNT and LAMAR HUNT,
Plaintiffs,

against

MOBIL OIL CORPORATION, TEXACO, INC., STANDARD OIL COMPANY OF CALIFORNIA, THE BRITISH PETROLEUM COMPANY, LTD., SHELL PETROLEUM COMPANY, LTD., EXXON CORPORATION, GULF OIL CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, GRACE PETROLEUM CORP., and GELSENBERG AG,
Defendants.

Plainitffs Nelson Bunker Hunt, W. Herbert Hunt and Lamar Hunt, by their attorneys, Paul, Weiss, Rifkind, Wharton & Garrison, allege:

Jurisdiction and Venue

1. Plaintiffs bring this action to recover threefold the damages sustained by them as a result of their being injured in their business and property by reason of defendants' violations of the federal antitrust laws, and more particularly, of Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 73 of the Wilson Tariff Act, 15 U.S.C. §8. In addition, plaintiffs seek to recover damages arising out of defendants' breaches of contract. Jurisdiction is conferred on this Court by Sections 4, 12 and 16 of the Clayton Act, 15 U.S.C. §§15, 22 and 26; by Section 74 of the Wilson Tariff Act, 15 U.S.C. §9; by 28 U.S.C. §1337; by 28 U.S.C. 1332; and by the doctrine of pendent jurisdiction.

2. Defendants reside, inhabit, can be found, do business, or transact business in the Southern District of New York. Venue in this District is proper under §§2 and 12 of the Clayton Act, 15 U.S.C. §§15 and 22; under 28 U.S.C. §1391; and under §77 of the Wilson Tariff Act, Aug. 27, 1894, Ch. 349, 28 Stat. 570.

The Parties

3. Plaintiffs Nelson Bunker Hunt, W. Herbert Hunt and Lamar Hunt are citizens and residents of the United States and of the State of Texas. Their principal place of business is 1401 Elm Street, Dallas, Texas 75202. Plaintiffs have been in the business of exploring for, producing and selling crude oil in Libya and elsewhere. Plaintiffs owned undivided interests in their Libyan enterprise and did business as individuals under the name of Nelson Bunker Hunt. Hereinafter plaintiffs collectively will be referred to as Hunt, plaintiff or plaintiff Hunt.

4. Defendants are:

(a) Mobil Oil Corporation (hereinafter "Mobil"), a New York corporation with its principal place of business at 150 East 42nd Street, New York, New York 10017;

(b) Texaco Incorporated (hereinafter "Texaco"), a Delaware corporation with its principal place of business at 135 East 52nd Street, New York, New York 10022;

(c) Standard Oil Company of California (hereinafter "SoCal"), a Delaware corporation with its principal place of business at 225 Bush Street, San Francisco, California 94104;

(d) The British Petroleum Company Limited (hereinafter "BP"), a United Kingdom corporation with its principal place of business at Britannic House, Moor Lane, London, England;

(e) Shell Petroleum Company Ltd. (hereinafter "Shell"), a United Kingdom corporation with its principal place of business at Shell Centre, London S.E. 1, England;

(f) Exxon Corporation (hereinafter "Exxon"), a New Jersey corporation with its principal place of business at 1251 Avenue of the Americas, New York, New York 10017;

(g) Gulf Oil Corporation (hereinafter "Gulf"), a Pennsylvania corporation with its principal place of business at the Gulf Building, Pittsburgh, Pennsylvania 15230;

(h) Occidental Petroleum Corporation (hereinafter "Occidental"), a California corporation with its principal place of business at 10889 Wilshire Boulevard, Los Angeles, California 90024;

(i) Grace Petroleum Corp. (hereinafter "Grace"), a Delaware corporation with its principal place of business at Grace Plaza, 1114 Avenue of the Americas, New York, New York 10036; and

(j) Gelsenberg AG (hereinafter "Gelsenberg"), a West Germany corporation with its pricipal place of business at Rosastrasse 2, Essen 4300, West Germany.

Trade and Commerce

5. Defendants do business in, and comprise a substantial part of the international petroleum industry. This industry involves several levels of operation, including: the exploration for and production of crude oil, the transportation of crude oil, the refining of crude oil, the transportation of refined petroleum products, and the marketing of refined petroleum products.

6. Defendants Mobil, Exxon, Shell, Texaco, SoCal, BP and Gulf (hereinafter the "seven majors") are vertically integrated companies operating in the United States and internationally at every one of these five levels. They each explore for and produce crude oil in the United States and elsewhere, and each has United States and worldwide facilities for transporting and refining crude oil. They each market refined petroleum products in the United States and elsewhere through dealers associated or affiliated with or owned by them.

(a) In the United States the seven majors own 48 per-cent of the Nation's proved crude oil reserves, 40 per cent of crude oil production, and 44 per cent of refining capacity, and they account for 44 per cent of gasoline sales.

(b) Internationally, the seven majors, together with an eighth and much smaller company, Compagnie Francaise des Petroles (hereinafter "CFP"), account for 80 per cent of world trade in crude oil.

(c) The bulk of the seven majors' non-domestic crude oil production is in the Persian Gulf area—in Saudi Arabia, Iran, Iraq, Kuwait, the Neutral Zone, Abu Dhabi, Qatar, Dubai and Oman. In 1972, for example, the seven majors produced over 13 million barrels per day in these countries.

(d) The majors' production in Libya, on the other hand, was and is much less significant—less than one-tenth as

much crude oil as in the Persian Gulf. Defendant Gulf has no Libyan production.

(e) The seven majors reported revenues and net income for 1974 as follows:

		Revenues		Net Income	
Exxon	—	$45.84 billion		$3.10 billion	
Shell	—	32.00	"	2.70	"
Texaco	—	23.99	"	1.59	"
Mobil	—	20.37	"	1.04	"
SoCal	—	18.80	"	0.97	"
Gulf	—	18.20	"	1.07	"
BP	—	18.00	"	1.80	"

7. Defendants Occidental and Gelsenberg are large diversified companies which produce crude oil in Libya and elsewhere, and refine, transport and market crude oil and other petroleum products.

8. Defendant Grace is a large diversified company which produces crude oil in Libya.

9. Plaintiff Hunt is a non-integrated oil producer who operates only at the exploration and production levels. He has never had facilities to transport or refine crude oil, or to transport or market refined petroleum products. Unlike the defendants, who refine all or most of their own crude oil production, Hunt sells all of his oil production in the so-called "third party" market; buyers in that market include the seven majors. Libya has been his only source of crude oil.

10. Since Libya began producing crude oil for export in 1961, its role in the world crude oil trade has been small but significant.

(a) Compared to the Persion Gulf countries, Libya's proven reserves of crude oil are small. In 1971, they were only 30 billion barrels. Proven reserves in the Persian Gulf countries exceeded 350 billion barrels and were and are increasing at a rapid rate.

(b) Compared to Persian Gulf oil, Libyan oil is light (and therefore high in valuable gasoline distillates), very low in sulphur (an undesirable pollutant removable only at considerable expense), and geographically close to West European and American markets.

(c) Two-thirds of Libya's oil production by 1971 was controlled by companies other than the seven majors.

(d) Libya by 1971 accounted for over 25 per cent of oil sales to Western Europe, a market previously dominated by Persian Gulf crude oil.

11. Over one-third of the United States' crude oil and other petroleum needs of 16 million barrels a day are imported. In 1971, approximately 100,000 barrels a day were imported directly from Libya.

The Factual Background

12. Between the end of World War II and 1970, the seven majors dominated world trade in crude oil. They controlled Persian Gulf production through a series of multi-company consortiums. Some 85 per cent of such production was marketed on an intra-company transfer basis. Price bore no relationship to the cost of extraction; the cost of extracting crude oil in the Persian Gulf was as

little as six cents a barrel, while the price at which it was marketed ranged between $1.40 and $2.50 a barrel.

13. Until 1970, the pricing system for trade in Persian Gulf crude oil worked substantially as follows: The majors would announce "posted" prices which, in the 1950s, reflected actual market prices (freight on board at export terminals). During the 1950s and 1960s, an excess of supply and the majors' desire to displace other energy sources caused market prices to decline. But posted prices did not change. By 1960, posted prices had become fictitious, merely a reference point for the purpose of determining royalties and taxes. "Profits," computed by deducting the cost of production from the posted price, were taxed at a 50 per cent rate by the host countries, with royalties being first credited and later expensed against the tax due.

14. When Libyan crude oil production started in 1961 and non-major companies—including non-integrated companies who would put all their crude oil into the market place—began to acquire control of substantial production, the ability of the seven majors to administer production and world market price, and thereby to maximize and manipulate profits, was put in jeopardy.

15. Between 1961 and 1964, taxes in Libya were determined by reference to market price rather than the higher posted price, contrary to the practice in the Persian Gulf. Because market prices were lower than posted prices, this reduced the "tax paid cost" of Libyan oil. When the non-majors began sharply to expand their share of Libyan production, those of the seven majors with production in Libya induced the government in 1965 to abandon the use of market price as the tax reference, and to substitute posted price. Exxon drafted the new tax law for the government. The purpose and effect was to eliminate any

cost advantage enjoyed by the non-majors' fast-increasing Libyan production over the majors' Persian Gulf production.

16. In 1957, plaintiff Hunt had obtained concession rights from the Libyan government to explore for, produce and sell crude oil. In September 1960, with the approval of the Libyan government, Hunt assigned an undivided one-half interest in his concession to defendant BP. Oil reserves estimated at 11 billion barrels were discovered on the Hunt-BP concession at Sarir Field in November 1961, ranking it among the world's half dozen largest fields. Hunt and BP spent $250 million developing production at Sarir. They drilled 89 wells, laid a 320 mile pipeline, constructed a terminal at Marsa al Hariga/Tobruk and built a gas condensate recovering plant. Production began at Sarir in January 1967 and reached a level of 450,000 barrels per day.

17. In September 1969, Colonel Moamer Qaddafi assumed power in Libya under the government known as the Revolutionary Command Council ("RCC"). It was the oft-stated intent of Colonel Qaddafi and the RCC to increase the price of Libyan oil, increase Libya's share (the "government take") of the price, increase Libya's control over production and ultimately increase Libya's equity participation in the oil reserves and production facilities in that country. Thereafter, the RCC made continual demands upon individual Libyan oil producers, particularly Hunt and other non-major producers, relating first to price and government take, and then to control of production and equity participation. These demands were often accompanied by threats of cutbacks in production, embargos and nationalization. Sharp production cutbacks were actually imposed, usually in the name of "conservation."

Agreements resulted, first with Occidental, which was rewarded with cancellation of prior production cutbacks, and then with all other Libyan producers. The 1970 agreements increased the posted price of Libyan crude oil by 30 cents and the tax rate applied to the posted price from 50 to 54-58 per cent.

18. These Libyan agreements prompted similar demands by other oil-producing countries, and led the Organization of Petroleum Exporting Countries ("OPEC") and OPEC's Persian Gulf member states to demand increases in their posted prices and government take, and, later, control over production and equity participation. OPEC's demands were officially formulated in a series of resolutions promulgated in Caracas, Venezuela, on December 9-12, 1970. Negotiations between the Persian Gulf countries and companes producing oil in the Gulf area, principally the seven majors, to implement the new demands were scheduled for Teheran in January of 1971.

19. On January 3 and again on January 9, 1971, despite the recently concluded "agreements" with the oil producers, Libya demanded new increases in the posted price for Libyan oil and in the tax rate, plus required "reinvestment" in Libya by producers at the rate of 25 cents per barrel. The RCC moved first against Hunt and Occidental, giving each until January 16, 1971 to accept these allegedly "non-negotiable" demands.

20. Almost simultaneously with these new Libyan demands, top executives of the seven majors met secretly in New York City to concert their response to the demands of Libya, OPEC and the Persian Gulf members of OPEC. One purpose of this concerted action, from which producers like Hunt were excluded, was to present a united front to the oil-producing countries and thereby strengthen

the seven majors' bargaining position. The seven majors also feared continual escalation of demands by the oil-producing countries—they feared a "leap frogging" where, if an agreement were reached with one producing country, another would attempt to obtain terms equally or more favorable. Since the Libyan government were making the most extreme demands at this time, the seven majors were particularly concerned that any agreement between a significant Libyan producer and the Libyan government would escalate the Persian Gulf countries' demands and thus burden the seven majors' much more extensive Persian Gulf holdings. At these January 1971 meetings in New York City, the seven majors agreed among themselves that they would negotiate only as a group with the oil-producing countries, and only with the countries as a group.

21. Hunt and the other Libyan producers were belatedly invited on January 9 to join the New York meeting. The Antitrust Division of the United States Department of Justice had insisted upon their inclusion as a condition of its stating that it had no present intention to bring an enforcement action against certain specified actions of the seven majors. Another purpose of the seven majors in admitting Hunt and the other Libyan producers to the meeting was to try to prevent any of them from accepting the terms laid down by Libya, which terms might set an undesirable precedent for the Persian Gulf where the seven majors had their principal interests, or otherwise conflict with the interests of the seven majors.

22. Between January 10 and January 15, 1971, representatives of Hunt and the other non-major Libyan producers met in New York City with the seven majors. All agreed on the desirability of industry-wide negotiations

with Libya and the other OPEC countries. A joint statement to that effect to be addressed to OPEC was agreed upon. It was also agreed that there should be some form of equitable risk-sharing. A draft agreement to achieve this purpose was prepared by counsel to the major oil companies. Hunt's representatives strenuously objected to key features of the proposed agreement. In some instances, Hunt's pleas for firm contractual protections were met with informal assurances about the other parties' "intentions." But most of Hunt's objections were rejected. Nevertheless, for a variety of reasons, Hunt signed the agreement: because of the January 16 deadline imposed by the RCC, the belief that industry-wide and OPEC-wide negotiations were preferable to unilateral negotiations with the RCC and would obviate the necessity for implementation of the risk-sharing provisions, a misplaced confidence in the good faith and expressed intentions of the other parties, and fear that he would be boycotted if he refused to sign (all of his customers were among the other signatories).

23. The agreement, dated January 15, 1971 and styled the Libyan Producers' Agreement (Exhibit A hereto) provides, in relevant part:

> "1. Until December 31, 1973, each of the parties declares its intention not to make any agreement or offer of agreement with the Libyan Government with respect to 'government take' as applied to crude oil without the assent of the other parties hereto; it is furthermore the intention of the parties that they will endeavor, before making any agreement with the Libyan Government, to include a requirement that the Libyan Government accept an offer on comparable terms . . . from all other concessionaires;

> "2. If after January 8, 1971, the Libyan production of any party or parties is cut back as a result of Libyan Government action below the average daily level prevailing in December 1970, all of the parties will share such cutback or cutbacks during the period thereof but not beyond December 31, 1973 . . .
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> "3. During any sharing program under paragraph 2 or a total shutdown of the parties' production in Libya, those of the parties with Persian Gulf production in excess of 150,000 barrels per day (the 'Persian Gulf Producing Parties') shall further be obligated to supply Middle East crude at cost, f.o.b. Persian Gulf loading ports to the parties other than the Persian Gulf Producing Parties . . . to meet commitments to pre-existing European and Western Hemisphere customers or renewals thereof. . . .
>
> • • •
>
> "5. If prior to December 31, 1973 a party makes an offer of an agreement or makes an agreement with the Libyan Government of the kind described in paragraph 1, without the assent of the other parties, it shall thereupon cease to be entitled to any of the benefits, but shall not be relieved of the obligations provided in paragraphs 2 and 3."

Section 4 of the agreement provides that, in certain circumstances, a party obligated to supply Persian Gulf crude could opt to substitute cash.

24. To implement and administer the Libyan Producers' Agreement, and generally to concert efforts to stabilize and coordinate the relative tax-paid cost, price and other terms of crude oil production in Libya and the Persian Gulf, the seven majors continued in existence and supplemented an

intricate system of multi-company organizations which they controlled and dominated. These organizations included the London Policy Group ("LPG"), the London Administrative Group ("LAG"), the New York Group ("NYG"), the Libyan Operators Group ("LOG"), and various legal and technical subcommittees of these groups, including the Libyan Emergency Supply Subcommittee ("LESSCOM"). Chief executives and other high officials of the seven majors continued to meet in New York and elsewhere to discuss and coordinated policy with respect to the tax-paid costs, prices and other terms of trade of Libyan and Persian Gulf crude oil.

25. Upon obtaining the signatures of Hunt and the other non-major producers to the Libyan Producers' Agreement, the seven majors immediately abandoned the agreed-upon "global" approach to negotiations. They decided among themselves that negotiations with Libya and the Persian Gulf countries should be separately conducted, and that the Teheran negotiations with the Persian Gulf countries should proceed forthwith. This separation deprived Hunt of the major benefit he thought he had obtained in return for signing an otherwise unsatisfactory agreement, while burdening him with the Agreement's market, customers and other restrictions—for while the majors had a role in Libyan negotiations, he had none in Persian Gulf negotiations. The separation provided the seven majors both an incentive and a mechanism to delay Libyan agreement and enabled them to reach agreement on tax-paid costs, prices and other terms of trade with the Persian Gulf countries more favorable to the majors than the terms of any Libyan agreement. The effect was to protect tax-paid costs, prices and other terms of trade in the Persian Gulf where the majors' production and reserves were centered, and to make less competitive the crude oil of Libya, where Hunt had all of his production and reserves.

26. On February 14, 1971 the Teheran negotiations produced an agreement between the seven majors and the Persian Gulf countries that promised five years of oil price stability and also contained a number of terms disadvantageous to the Libyan oil producers in general and to Hunt in particular.

27. In thus violating their pledges, the seven majors obtained a measure of insulation from Libyan practice and precedent for their principal interests in the Persian Gulf. Libya, on the other hand, was encouraged to use the terms negotiated in the Persian Gulf as the starting point for its new demands.

28. In April of 1971 the Libyan oil producers reached agreement with Libya after several months of negotiations in which the defendants pursued objectives hostile to the interests of Hunt. Libya obtained an increase in its take of 65 cents per barrel, thereby leap-frogging the Persian Gulf countries. The majors were willing to accept these increases in this relatively unimportant producing area so long as the increases could be characterized as "fluctuating freight differentials"—the majors had previously won agreement from the Persian Gulf countries not to treat such differentials as precedents for Gulf prices. Other non-major Libyan producers, short of crude for their own refineries, were less concerned about the non-competitiveness of Libyan oil in the "third-party" markets where Hunt alone sold all of his production.

29. By September 1971, both Libya and the OPEC countries began asserting new demands, this time seeking equity participation and protection against the dollar devaluation of the prior month.

30. In the face of these new demands, the seven majors and the other Libyan oil producers again met in New York.

On October 18, 1971 the parties to the Libyan Producers' Agreement executed a Memorandum of Intent and a Memorandum of Confirmation (Exhibits B and C hereto). These written agreements purported to reaffirm the January 15 commitment collectively to consider the demands of the oil producing states. The parties agreed that any demands or action by Libya relating to governmental equity participation in Libya holdings were within the scope of the January 15 agreement. They agreed also that any offer or agreement with Libya on the subject of equity participation must receive the prior consent of all parties, and that any party entering into such an agreement must attempt to secure equivalent terms for the other countries.

31. In keeping with prior practice, the majors immediately reneged on this October 18 commitment to collective action; they proceeded to deal with the parity and equity participation questions separate and apart from the other Libyan producers. The seven majors met secretly to coordinate their positions, and their own team of negotiators dealt with the Persian Gulf countries.

32. On December 7, 1971 Libya nationalized BP's half of the Sarir Field, and demanded that Hunt market BP's share of the Sarir production, for Libya's account.

33. The chief executive officers of the seven majors and of the other Libyan producers met in New York City on December 13, 1971 to discuss the problem of nationalization. BP and the other majors insisted that Hunt refuse to market BP's oil. In order to induce Hunt to resist the Libyan demand, all parties to the Libyan Producers' Agreement signed a further Memorandum of Confirmation (attached hereto as Exhibit D) in which they agreed that a total or partial nationalization by Libya of any party's property was within the scope of the Agreement and "that any

demand or action by the Libyan government relating to any such nationalization which attempts to or does in fact impose restrictions, obligations, or duties on any other party hereto is within the purview of said agreement."

34. Hunt, in response to urgent requests and in reliance upon the assurances of BP, the other majors, and the other parties to the Libyan Producers' Agreement, did refuse to market BP's oil for Libya's account. As a result, Hunt personnel were evicted from Sarir early in 1972 and his permissible oil production cut back by 50 per cent.

35. Thereafter, BP and Hunt began receiving crude oil from the other parties to the Libyan Producers' Agreement.

36. In October 1972, the Libyan government demanded an immediate 50 per cent equity participation in Hunt's interests in Sarir.

37. The seven majors feared that Hunt's acquiescence in Libya's demands would adversely affect or upset their own so-called "Yamani" negotiations in the Persian Gulf, the terms of which they had kept secret from Hunt. Unknown to Hunt, the proposed Persian Gulf terms were milder than those sought against Hunt by Libya, and were to be matched by corresponding increases in production ceilings (a response not feasible in Libya), thereby making implementation virtually costless to the seven majors. To prevent an untimely Libyan agreement, the chief executives of the majors met with Hunt and the other Libyan producers in New York City on November 20, 1972. The majors proposed changes in the Libyan Producers' Agreement to induce Hunt and the other Libyan producers to resist the new demands as long as possible. But they rejected Hunt's now reiterated demand that the pre-

existing customer restriction, which gave such customers an unfair bargaining advantage, be deleted. On November 21, 1972, the parties to the January 15, 1971 Agreement signed a Supplement thereto (Exhibit E hereto), extending the Agreement on a somewhat modified basis through 1974.

38. Hunt thereupon rejected the Libyan demands. The Libyan government responded with further demands and proposals regarding equity participation. At the insistence of the majors and the other producers, who included all of his then customers, Hunt once again rejected the Libyan demands and did not reach an agreement with the Libyan government on equity participation.

39. On December 11, 1972, the seven majors met to coordinate their strategy with respect to equity participation in Libya. Hunt was not invited to attend, nor was he apprised of what was decided upon.

40. Also on December 11, 1972, as a result of Hunt's refusal to market the BP oil expropriated by Libya and his refusal to accept the equity participation demands of the Libyan government, the Libyan government refused to permit further export of Hunt's oil. This embargo lasted for about three weeks, until Hunt commenced international arbitration proceedings against Libya.

41. On May 24, 1973, Hunt was informed that Libya had terminated his right to produce and export crude oil. On June 11, 1973, all of his assets were formally nationalized.

42. The quality of the oil supplied Hunt under the Libyan Producers' Agreement had gradually deteriorated, as the defendants and other parties substituted Arabian

and Kuwait heavy crude in place of the light oil called for under the agreement. When oil prices rose in 1973, all defendants except Exxon ceased to provide oil at all, a step taken by Mobil as early as the fall of 1972. No defendant has complied fully with its contractual obligation to supply Hunt with oil.

43. Hunt was forced to sell any Persian Gulf oil he did receive under the Agreement well below market because the Agreement, over his objections, had restricted Hunt's sales of Persian Gulf crude oil to pre-existing Western Hemisphere and European customers. Since he only had three such customers, and each was a party to the Agreement, they exploited the restrictions and refused to take oil from Hunt except at a distress price.

44. Through the end of 1974, the defendants named herein delivered to Hunt under the Agreement approximately 13,346,000 barrels of Libyan oil and 35,750,000 barrels of customer-restricted Persian Gulf oil. They have withheld at least another 90 million barrels of crude oil, although each knew that the necessary consequence of this failure to perform was elimination of Hunt from the world crude oil trade.

45. After Hunt's interest in the Sarir Field was nationalized, defendants Mobil, Occidental, Grace and Gelsenberg quickly reached agreements with Libya on equity participation terms which they had insisted that Hunt reject. Contrary to their obligations under the Libyan Producers' Agreement, they did not seek or receive Hunt's consent to these agreements. And no defendant has sought to obtain terms for Hunt comparable to those offered it by Libya.

FIRST CLAIM

46. Plaintiff Hunt realleges each allegation contained in paragraphs 1 through 45.

47. Since at least January 1970 and continuing to the date of the filing of this complaint, all defendants, along with co-conspirators named and not named, have, in this District and elsewhere, engaged in a combination and/or conspiracy in unreasonable restraint of the trade and commerce of the United States with foreign nations in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 73 of the Wilson Tariff Act, 15 U.S.C. §8.

48. This was no new development, because for many years, beginning no later than 1946, the seven majors have conspired among themselves and with others to regulate production, administer price, divide markets and allocate customers.

49. In furtherance of this objective, the seven majors have conducted their principal crude oil production, particularly in the Persian Gulf area, through a series of multi-company consortiums and inter-company exchange agreements, through which they have been able to regulate production, administer prices, divide markets and allocate customers.

50. When other persons began to produce and market Libyan crude oil in increasing quantities after 1961, the seven majors took steps to eliminate certain competitive advantages enjoyed by these other companies and otherwise restrain their ability to compete. The means used included but were not limited to:

(a) Manipulation of the tax laws of Libya so as to increase tax-paid costs, and thereby prices;

(b) Negotiation and administration of the Libyan Producers' Agreement so as to disadvantage Libyan oil relative to Persian Gulf oil; and

(c) Erection of barriers to keep producers like Hunt out of markets dominated by the seven majors or away from customers serviced by the majors.

51. Among the means utilized by the seven majors was their insistence that Hunt surrender his right to sell Persian Gulf crude oil supplied under the Libyan Producers' Agreement to anyone other than pre-existing Western Hemisphere and European customers. The seven majors and the other defendants insisted upon adhering to the customer restriction even when Hunt complained it was being used unfairly in price negotiations over the restricted oil.

52. The pre-existing-customer clause in the Libyan Producers' Agreement was and is an unlawful agreement among competitors to allocate customers and territorially to divide markets.

53. This unlawful agreement affected the flow of crude oil and refined petroleum products into the United States, the price of crude oil and refined petroleum products in the United States and abroad, as well as the profits to be derived from interstate and foreign commerce by American companies.

54. By joining the Libyan Producers' Agreement and assisting the seven majors to enforce the pre-existing customer clause, the other Libyan producers named as defendants became co-conspirators with the seven majors, and parties to an unlawful contract and combination in restraint of trade.

55. By reason of the unlawful conduct herein complained of, plaintiff Hunt has been and will continue to be injured in his business and property.

(a) The pre-existing-customer clause limited the Persian Gulf crude oil to which Hunt was entitled under the Libyan Producers' Agreement to that which he could sell to his then pre-existing European and Western Hemisphere customers;

(b) At the time of the Agreement and throughout its term, Hunt had only three such customers, all of whom were parties to the Agreement, two—Exxon and Shell—being among the seven majors;

(c) Hunt was the only party to the Agreement without refining capacity of his own and with no pre-existing Western Hemisphere or European customer outside the Agreement;

(d) Hunt was, therefore, the only party to the Agreement whose benefits thereunder were wholly at the mercy of his fellow signatories;

(e) Because Hunt had no other source of crude oil after his shut-in, he was precluded from seeking new customers or entering new markets, where normal profits could have been obtained;

(f) Knowing that Hunt could sell Persian Gulf crude oil only to them, defendants Exxon and Shell and the third customer refused to pay market price for the oil, compelling Hunt to sell such oil at distress prices;

(g) For each of the approximately 35,750,000 barrels of Persian Gulf crude oil provided Hunt under the Libyan Producers' Agreement between July 1, 1972 and August 31, 1974, Hunt was denied the profit of from 50 cents to $2 a barrel that he would otherwise have earned and that was

earned by all other beneficiaries under the Agreement, and was compelled to accept a profit of between 13 and 20 cents a barrel.

SECOND CLAIM

56. Plaintiff Hunt realleges each allegation contained in paragraphs 1 through 45.

57. Since at least 1970, the defendants named herein, along with co-conspirators named and not named, have, in this District and elsewhere, engaged in a combination and/or conspiracy in unreasonable restraint of the foreign trade and commerce of the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, and of Section 73 of the Wilson Tariff Act, 15 U.S.C. §8.

58. As part of the unlawful conduct complained of, the defendants have agreed to act in concert to refuse to supply Hunt with the crude oil to which he was entitled under the Libyan Producers' Agreement, as amended and supplemented, and they have agreed to engage in concerted action to boycott Hunt and to deprive him of the crude oil needed to fulfill his contracts with purchasers of crude oil, thereby causing him to lose his existing contracts, any opportunities for renewal, and access to new customers and markets.

59. This concerted refusal to deal and group boycott have had the following effects, among others:

(a) The defendants have withheld from Hunt at least 90 million barrels of oil lawfully due him;

(b) Hunt has been eliminated as a source of crude oil in the world crude oil trade;

(c) Crude oil purchasers in the United States and elsewhere have been denied access to Hunt's oil and the competition for their business previously provided by Hunt.

60. By reason of this concerted refusal to deal and group boycott, Hunt has been and will continue to be injured in his business and property. He has sustained damages, the full extent of which cannot presently be calculated, but which include:

(a) A loss of at least $90 million, consisting of lost profits on the sale of the 90 million barrels of crude oil improperly withheld from him;

(b) Still further losses from being eliminated as a source of crude oil in the world crude oil trade.

THIRD CLAIM

61. Plaintiff Hunt realleges each and every allegation contained in paragraphs 1 through 45.

62. Since at least 1970, the seven majors along with co-conspirators named and not named, have engaged in a combinatiton and/or conspiracy in unreasonable restraint of the foreign trade and commerce of the United States, in violation of the Sherman Act, 15 U.S.C. §1, and of Section 73 of the Wilson Tariff Act, 15 U.S.C. §8.

63. As part of the unlawful conduct complained of, the seven majors have combined and conspired among themselves to preserve the competitive advantage of Persian Gulf crude oil relative to that of Libyan crude oil, and to diminish competition from Libyan crude oil producers. To these ends they have combined and conspired to prevent plaintiff Hunt and other Libyan producers from reaching any agreement with the Libyan government inconsistent with that competitive advantage, even where they

knew that the necessary and foreseeable consequence of their conduct would be Hunt's elimination as a Libyan crude oil producer.

64. In furtherance of this unlawful combination and conspiracy, the seven majors entered into written agreements with Hunt and other Libyan producers, manipulated the course of Libyan negotiations so as to advance their own interests in the Persian Gulf, and followed a course of action that led to Hunt's nationalization and elimination from the production of Libyan crude oil.

65. By reason of this unlawful combination and conspiracy, Hunt has been and will continue to be injured in his business and property. He has sustained damages, the full extent of which cannot presently be calculated, but which include lost profits on his half interest in the 11 billion barrels of crude oil contained in the Sarir Field.

FOURTH CLAIM

66. Plaintiff Hunt realleges each allegation contained in paragraphs 1 through 45.

67. The defendants have, despite Hunt's demand, failed to perform their obligations under the Libyan Producers' Agreement of January 15, 1971, as amended and supplemented by the agreements of October 18, 1971, December 16, 1971, and November 21, 1972, by

(a) Failing to supply Hunt with at least 90 million barrels of Libyan and/or Persian Gulf crude oil of proper grade and quality due to him; and

(b) Entering into agreements with the Libyan government or making proposals to that government regarding

their own holdings in Libya without seeking or obtaining Hunt's consent, and without attempting to obtain comparable terms for Hunt.

68. Throughout the terms of these agreements, Hunt has duly performed all the conditions and duties required of him by the agreements.

69. By virtue of defendants' failure to perform their obligations under the agreements, Hunt has suffered damages of at least $90 million when he did not receive the crude oil owed him when it was due, and of additional amounts when he was denied the promised assistance of all defendants in obtaining terms from the Libyan government comparable to those obtained by them. Finally, as a result of their breaches, he has lost his expectation of future profits from his interest in the Sarir Field.

PRAYER FOR RELIEF

Wherefore, plaintiff Hunt hereby demands judgment against defendants as follows:

1. As to the First, Second and Third Claims:

(a) That the Court adjudge and decree that the defendants have engaged in unlawful combinations, conspiracies and agreements in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act and Section 73 of the Wilson Tariff Act;

(b) That the defendants, their successors, assignees and transferees, their respective officers, directors, agents and employees, and all persons acting or claiming to act on behalf thereof or in concert therewith, be permanently enjoined from in any manner, directly or indirectly, con-

tinuing, maintaining or renewing the combinations, conspiracies, and agreements alleged in these counts, or from engaging in any combination and conspiracy having a similar purpose or effect, or from adopting or following any practice, plan or program having a similar purpose or effect.

(c) That plaintiff recover such damages, trebled pursuant to Section 4 of the Clayton Act and Section 79 of the Wilson Tariff Act, as he has sustained. Such damages are not presently calculable, except that one component of these damages (lost profits on the 90 million barrels of crude oil improperly withheld from him) totals no less than $90 million before trebling, and that another component (lost profits on some 35,750,000 barrels of Persian Gulf oil delivered to him subject to a customer restriction) totals in excess of $35 million before trebling and

(d) That plaintiff be awarded reasonable attorneys' fees, all costs and disbursements incurred in this action, and such other and further relief as this Court may deem just and proper.

2. As to the Fourth Claim:

(a) That this Court adjudge and decree that the defendants named herein have failed to comply with their obligations under the aforementioned agreements;

(b) That this Court award damages for breaches of contract in an amount not presently calculable, but in no event less than $90 million;

(c) That plaintiff be awarded costs, and such other and further relief as this Court may deem just and proper.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By /s/ Jay H. Topkis

Jay H. Topkis
345 Park Avenue
New York, N.Y. 10022
(212) 644-8734
Attorneys for Plaintiffs

Of Counsel:

Daniel P. Levitt
Anthony M. Radice
345 Park Avenue
New York, New York 10022
(212) 644-8000

Philip, Hirschkop & Associates, Ltd.
P. O. Box 1226
Alexandria, Virginia 22313
(703) 836-5555

January 9, 1976

Exhibit A to Amended Complaint

LIBYAN PRODUCERS AGREEMENT OF JANUARY 15, 1971

Recent events in petroleum exporting countries have raised serious questions as to the stability of oil supply at reasonable cost and as to the contractual arrangements under which such supply is assured. Such stability has been recognized by the governments of the United States and other oil consuming nations as vital to their mutual security. These recent events include unilateral demands for changes in agreed arrangements and concerted action on the part of exporting countries in support of such unilateral demands, including threatened interruptions of supply. In these circumstances, individual companies find themselves unable to conduct meaningful negotiations.

Each party recognizes and affirms that it is entering this agreement of its own free will and pursuant to its own individual judgment as to its own best interests.

Each party recognizes that if it should stand firm in refusing the demands of the Libyan Government, it might suffer serious financial consequences which would not be fully alleviated by the limited mutual self-help provisions of this agreement.

Nevertheless, each party agrees that in view of the substantial benefits expected to be derived by it from this agreement, it is prepared to participate herein.

In light of these most serious cirmustances it is agreed as follows:

1. Until December 31, 1973, each of the parties declares its intention not to make any agreement or offer of agreement with the Libyan Government with respect to "government take" as applied to crude oil without the assent of the other parties hereto; it is furthermore the intention of the parties that they will endeavor, before making any agreement with the Libyan Government, to include

a requirement that the Libyan Government accept an offer on comparable terms, adjusted for basic differences in applicable agreements as they now stand, from all other concessionaires; provided, however, that nothing contained in this paragraph 1 shall obligate any company to take or refrain from taking any action if to do so would, in its opinion, be contrary to its vital interests.

2. If after January 8, 1971, the Libyan production of any party or parties is cut back as a result of Libyan Government action below the average daily level prevailing in December 1970, all of the parties will share such cutback or cutbacks during the period thereof but not beyond December 31, 1973, in accordance with the following:

(a) Except as provided in paragraph 2(e), 3 and 4 below, an obligation of a party shall be limited to the supply of Libyan crude oil from its Libyan production at cost f.o.b. Libyan port.

(b) During 1971, 100% of such cutback or cutbacks then in effect shall be shared on a basis proportionate to the respective shares of the parties of total Libyan production in the last full calendar month preceding the effective date of the first cutback after January 8, 1971.

(c) During 1972, 80% of such cutback or cutbacks then in effect shall be shared in each calendar quarter on a basis proportionate to the respective shares of the parties of total Libyan production in the next preceding calendar quarter, provided that for this purpose a party shall be deemed to have produced the amount of any cutback applied to it.

(d) During 1973, 60% of such cutback or cutbacks then in effect shall be shared in each calendar quarter on a basis proportionate to the respective shares of the parties of total Libyan production in the next preceding calendar quarter, provided that for this purpose a party shall be deemed to have produced the amount of any cutback applied to it.

(e) If a party has Libyan crude production and has an obligation to supply Libyan crude to another party or parties under this paragraph, but the supplier is prevented from supplying Libyan Government restrictions, the supplier shall be obligated, unless restrictions by other governments intervene, to supply, on a barrel-for-barrel basis, Persian Gulf Crude selected by the supplier at cost f.o.b. source for delivery to the pre-existing European and Western Hemisphere customer commitments and renewals thereof of the party or parties cutback with freight at AFRA Large Range 2 applicable to the monthly period in which delivery is made equalized between such source and the Libyan port; provided that the supplier shall have the option to provide in substitution for freight equalization the actual transportation needed to move such Persian Gulf crude from its supply source to the pre-existing European or Western Hemisphere customer, less than required to move Libyan crue to such pre-existing customer.

3. During any sharing program under paragraph 2 or a total shutdown of the parties' production in excess of 150,000 barrels per day (the "Persian Gulf Producing Parties") shall further be obligated to supply Middle East crude at cost, f.o.b. Persian Gulf

loading ports to the parties other than the Persian Gulf Producing Parties ("Non-Persian Gulf Producing Parties") to meet commitments to pre-existing European and Western Hemisphere customers or renewals thereof in amounts equal to the difference between any party's Libyan production in the last full calendar month preceding the effective date of the first cutback after January 8, 1971 and its Libyan crude availability after all adjustments under paragraph 2; provided that such total obligation of the Persian Gulf Producing Parties shall be subject to a maximum in 1971 of 1,500,000 barrels per day, in 1972 of 1,125,000 barrels per day, and in 1973 of 750,000 barrels per day, in each case less the number of barrels of crude oil supplied by the Persian Gulf Producing Parties to the Non-Persian Gulf Producing Parties in such year pursuant to paragraph 2.

4. In respect of each barrel of Persian Gulf crude oil a party is obligated to supply but has not supplied under paragraph 2(e) or 3:

(a) Such party shall have the option to elect to pay 10 cents; provided if such option is elected it shall apply pro rata as to every party to whom such Persian Gulf Producing Party has such an obligation;

(b) Such party shall have the obligation to pay said 10 cents if it is prevented from delivering such barrels by an act of the Government having jurisdiction and in each case such payment shall constitute a full and complete discharge of such party's obligations under such paragraph. Without in any way modifying, limiting or conditioning its legal right to exercise

the option set forth above in paragraph 4(a), and it being expressly understood that the exercise of such option shall give rise to no claim other than that for payment of the amounts due under paragraph 4(a), each of the Persian Gulf Producing Parties states that its present intention is to supply Persian Gulf crude oil in discharge of its obligations under paragraphs 2(e) and 3.

5. If prior to December 31 ,1973 a party makes an offer of an agreement or makes an agreement with the Libyan Government of the kind described in paragraph 1, without the assent of the other parties, it shall thereupon cease to be entitled to any of the benefits, but shall not be relieved of the obligations provided in paragraphs 2 and 3.

6. All obligations assumed hereunder shall be subject to force majeure except to the extent provided specifically to the contrary herein. Force majeure includes without limitation acts of God and acts of Sovereigns.

7. The Persian Gulf Producing Parties shall share the obligations defined in paragraph 3 on a basis to be agreed upon by them.

8. (a) "Cost" means tax-paid cost adjusted for retroactivity, if any.

(b) "Cutback" as to any party shall mean a reduction in production resulting from Libyan Government action for whatever reason and shall mean the sum of I and III or II and III:

I. In 1971 such party's average daily production in December, 1970 less the amount of such party's actual average daily pro-

duction as permitted by the Libyan Government;

II. In 1972 and 1973, the lesser of—

(i) Such party's average daily production in December, 1970 less the amount of such party's actual average daily production as permitted by the Libyan Government in the quarter for which the cutback is being determined; and

(ii) Such party's average daily production in the quarter preceding the quarter in which such party's cutback or cutbacks then in effect were first applied less the amount of such party's actual average daily production as permitted by the Libyan Government in the quarter for which the cutback is being determined.

III. Production of such party voluntarily shut in by such party where such production has become uneconomic because of cutbacks required by the Libyan Government.

(c) "Production" means crude oil exportable by the producer.

9. (a) Each party hereto covenants that it will not assert any claim against any other party or parties arising out of this agreement, except claims for non-performance of this agreement.

(b) Each party hereto waives any claim to the recovery of consequential damages for breach of this agreement.

(c) Each party agrees that the maximum damages recoverable by any party claiming non-performance of an obligation to deliver Libyan crude oil under paragraph 2 hereof shall be 25 U.S. cents times the number of barrels of Libyan crude oil which such party claims it was entitled but failed to receive hereunder.

(d) Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

10. This agreement consists of the entire agreement of the parties; there are no oral promises, representations or warranties.

11. (a) This agreement shall come into effect when both of the following have occurred:

(i) Signature by BP, Gulf, Jersey, Mobil, Shell, Socal and Texaco.

(ii) Advice has been received by the parties hereto from John J. McCloy that he has advised the State Department of this agreement and they have interposed no objection and have expressed support in principle and, further, that he has advised the Department of Justice of this agreement and it has stated in writing that it has no present intention of instituting any proceeding under the antitrutst laws with respect to the making or performance of this agreement.

(b) The parties hereto undertake to use best efforts promptly to notify each person or company now holding Libyan Petroleum Concessions of the opportunity to accede to this agreeemnt as provided hereinafter. Accession to this agreement shall be open to any other person or company which holds a Libyan Petroleum Concession until the earlier of January 30, 1971 or the date immediately prior to the date on which such company enters into or continues discussion with the Libyan Government after January 15, 1971 regarding the matters described in paragraph 1.

12. The parties hereto, except The British Petroleum Limited, Gelsenberg, A.G., Shell Petroleum Company, Ltd., and Shell Petroleum Maatschappij, agree to make such reports concerning the matters covered by this agreement as the Attorney General or the Secretary of State of the United States may request.

13. Any other provision to the contrary notwithstanding, this agreement shall terminate (a) upon receipt of advice from the Attorney General of the United States that the agreement in operation adversely affects the domestic or foreign commerce of the United States, or (b) upon receipt of advice from the Secretary of State and the Attorney General of the United States that circumstances have so changed that such agreement is no longer in the public interest. Provided that as to any party whose Libyan concession or property has been expropriated as a direct result of action taken by such party pursuant to this agreement, the obligations nevertheless of all other parties to such party as provided herein shall continue until the three year period provided for herein shall have expired,

unless the Secretary of State and Attorney General shall otherwise determine.

This agreement may be executed by the person or corporation holding a Libyan Petroleum Concession and/or by a parent, direct or indirect, of such corporation. In the latter event such parent undertakes to cause the Libyan Petroleum Concession holder in which it has an interest to perform this agreement and to take all action necessary to carry out the terms thereof.

January 15, 1971

Amerada Petroleum Corp. of Libia

By: A. T. Jacobson

Atlantic Richfield Company

By: J. A. Simmons

The British Petroleum Co. Ltd.

By: D. F. C. Steel

Continental Oil Co.

By: John E. Kircher

Gelsenberg A.G.

By: Schlbert

Grace Petroleum Corp.

By: E. L. Farrell, Jr.

Gulf Oil Corporation

By: A. R. Martin

Marathon Oil Company

By: J. R. Donnell

Nelson Bunker Hunt
By: Nelson Bunker Hunt

Mobil Oil Corporation

By: H. C. Moses

Occidental Petroleum Co.

By: William Bellano

Shell Petroleum Co. Ltd. & Shell Petroleum Maatschappij

By: Brian A. Carlisle

Standard Oil Co. of Calif.

By: Mac L. Parkhurst

Standard Oil Co. (N.J.)

By: Charles J. Hedlund

Texaco Inc.

By: A. C. Derane, Jr.

____

By: ____________

Exhibit B to Amended Complaint

MEMORANDUM OF INTENT

1. Recently concluded agreements between various petroleum exporting companies and petroleum producing companies operating within their borders were intended to establish and assure security of crude supply and stability of financial arrangements for a period of 5 years. These agreements resulted from negotiations carried on jointly by the companies with the governments within the contemplation of the document entitled "Message to OPEC" dated 16 January 1971. Notwithstanding these agreements, the same petroleum exporting countries are again jointly making demands for changes in existing arrangements with the oil companies and threatening concerted action unless negotiations satisfactorily achieve the government's objectives.

2. The current demands, broadly stated in OPEC Resolutions XXV-139 and 140, include the securing of effective government participation in existing oil concessions and the upward adjustment of oil revenues of the producing country governments to offset any alleged "adverse effect on the per barrel real income of member countries resulting from the international monetary developments as of 15th August 1971."

3. In this connection, the Iranian Consortium Member Companies have been informed by Dr. Amouzegar that he and Ministers Yamani and Hammadi have been appointed to negotiate implementation of Resolution 139 on behalf of the same six Persian Gulf states that were parties to the Teheran Agreement of 15 February 1971. The Consortium Members have also been advised by Dr. Amouzegar that he and Minister Atigi have been asked to negotiate

implementation of Resolution 140 on behalf of the same six states. Furthermore, the Libyan Minister of Petroleum on 26 September 1971 issued instructions on currency exchange to all concession holders which instructions are contrary to existing agreements between the concession holders and the government and which if not resisted will have the effect of achieving by unilateral action substantially the objective of Resolution 140.

4. In view of these demands and the threatened concert of government action in furtherance thereof, the oil companies find themselves once again, as in January 1971, unable on an individual basis to formulate and maintain effective negotiating positions and to conduct meaningful negotiations on these most serious issues. Hence, again, as in January 1971, they declare that they wish to consider collectively the responses to be made to the government's demands and courses of action to be followed either individually or jointly during the conduct of negotiations to be carried on by the companies (a) individually with one or more of the governments concerned or (b) by designated negotiators on behalf of some or all of the undersigned companies with one or more of the governments concerned, depending on circumstances.

5. In furtherance of the foregoing, the parties recommend that they either individually or collectively as appropriate make coordinated responses and take coordinated action with reference to the governments' demands or actions associated with or related to the subject matters dealt with in OPEC Resolutions XXV-139 and 140, including the Circular Letter of the Libyan Ministry of Petroleum issued on or about 26 September 1971.

6. It is understood that nothing contained in this memorandum shall obligate any party to take or refrain from

taking any action with reference to the government demands referred to above.

7. This Memorandum of Intent shall come into effect when the parties hereto and the parties to a Memorandum of Confirmation of even date have been advised by John J. McCloy, Esq. that he has informed the Department of Justice of both this Memorandum of Intent and said Memorandum of Confirmation and it has stated in writing that it has no present intention to take any action under the antitrust laws with respect to the making of either of said Memorandum or the activities contemplated therein.

8. The parties hereto, except the British Petroleum Company, Limited, Gelsenberg A.G., Hispanica de Petroleos S.A. (Hispanoil), Arabian Oil Company, Shell Petroleum Company, Ltd. and Shell Petroleum Maatschappij, agree to make such reports of activities pursuant to this Memorandum of Intent as the Department of Justice may request.

October 18, 1971

____________________ ____________________

By: ________________ By: ________________

____________________ ____________________

By: ________________ By: ________________

____________________ ____________________

By: ________________ By: ________________

____________________ ____________________

By: ________________ By: ________________

____________________ ____________________

By: ________________ By: ________________

Exhibit C to Amended Complaint

MEMORANDUM OF CONFIRMATION

1. The undersigned confirm their intent and understanding that any demands of or actions by the Libyan Government associated with or related to the subject matters dealt with in OPEC Resolutions XXV-139 and 140 (including but not limited to the Ministry of Petroleum's Circular Letter issued on or about September 26, 1971) are within the purview of the Libyan Producers' Agreement dated January 15, 1971, and particularly paragraph 1 thereof.

2. The confirmation herein contained shall come into effect when the parties hereto and the parties to a Memorandum of Intent of even date have been advised by John J. McCloy, Esq. that he has informed the Department of Justice of both this Memorandum of Confirmation and said Memorandum of Intent and it has stated in writing that it has no present intention to take any action under the antitrust laws with respect to the making of either of said Memoranda or the activities contemplated therein.

October 18, 1971

____________________ ____________________

By: ________________ By: ________________

____________________ ____________________

By: ________________ By: ________________

____________________ ____________________

By: ________________ By: ________________

Exhibit D to Amended Complaint

Further Memorandum of Confirmation

1. The undersigned parties to the Memorandum of Confirmation dated October 18, 1971, confirm their intent and understanding that the total or partial nationalization of the properties of any party hereto by the Libyan Government in contravention or breach of the applicable provisions of the Petroleum Law or the terms of any of the concession agreements of such party (including the action by the Libyan Government by decree dated 7 December 1971 with respect to the properties of BP Exploration Company (Libya) Limited in Concession 65) is within the purview of the Libyan Producers Agreement dated January 15, 1971, as confirmed by such Memorandum of Confirmation and that any demand or action by the Libyan Government relating to any such nationalization which attempts to or does in fact impose restrictions, obligations or duties on any other party hereto is within the purview of said agreement as so confirmed.

2. The undersigned parties to the Memorandum of Intent dated October 18, 1971, hereby confirm their intent and understanding that the subject matters provided in paragraph 1 hereof are included within the scope and provisions of such Memorandum of Intent.

3. The confirmation herein contained shall come into effect when the parties hereto have been advised by John J. McCloy, Esq. that he has informed the Department of Justice of this Further Memorandum of Confirmation and it has stated in writing that it has no present intention to take any action under the antitrust laws with respect to the

making of this Further Memorandum or the activities contemplated therein.

December 16, 1971

Parties to the Memorandum of Confirmation dated October 18, 1971	Parties to the Memorandum of Intent dated October 18, 1971
Murphy Oil Corporation By: Illegible	______________ By: ______________
Mobil Oil Corporation By: William E. Lindenmuth	Mobil Oil Corporation By: William E. Lindenmuth
Standard Oil Co. (N.J.) By: Charles J. Hedlund	Standard Oil Co. (N.J.) By: Charles J. Hedlund
Texaco Inc. By: L. W. Folmar	Texaco Inc. By: L. W. Folmar
The British Petroleum Corp. By: Illegible	The British Petroleum Co. By: Illegible
Amerada Petroleum Corp. of Lybia By: A. T. Jacobson	Amerada Petroleum Corp. of Lybia By: A. T. Jacobson
Marathon Oil Co. By: Illegible	Marathon Oil Co. By: Illegible
Standard Oil Company of Calif. By: W. Jones McQuin	Standard Oil Company of Calif. By: W. Jones McQuin
Occidental Petroleum Corp. By: Illegible	Occidental Petroleum Corp. By: Illegible

(Forward)
Parties to the Memorandum of Confirmation dated October 18, 1971

Gulf Oil Corp.
By: H. E. Hansen

____

By: ______________________

Grace Petroleum Corp.
By: Illegible

Gelsenberg A.G.
By: Illegible

____

By: ______________________

Atlantic Richfield Co.
By: Illegible

Continental Oil Co.
By: Illegible

____

By: ______________________

Shell Petroleum Company Ltd. & Shell Petroleum Maatschappij
By: Illegible

Nelson Bunker Hunt
By: Illegible

(Forward)
Parties to the Memorandum of Intent dated October 18, 1971

Gulf Oil Corp.
By: H. E. Hansen

American Independent Oil Corp.
By: Illegible

Grace Petroleum Corp.
By: Illegible

Gelsenberg A.G.
By: Illegible

Signal (Iran) Petroleum Company
By: Russell B. Newton, Jr.

Atlantic Richfield Co.
By: Illegible

Continental Oil Co.
By: Illegible

Illegible
By: Illegible

Shell Petroleum Company Ltd. & Shell Petroleum Maatschappij
By: Illegible

Nelson Bunker Hunt
By: Illegible

Arabian Oil Company, Ltd.
By: Illegible

Exhibit E to Amended Complaint

SUPPLEMENT TO LIBYAN PRODUCERS' AGREEMENT OF JANUARY 15, 1971

In view of the demand for participation outlined in OPEC Resolution XXV-139 and the threat of concerted Government action in support of that demand, the parties to the January 15, 1971 Libyan Producers' Agreement signed a Memorandum of Confirmation October 18, 1971 affirming that the participation issue is covered by the Libyan Producers' Agreement ("the Agreement"). Negotiations with respect to Libyan Government participation have not been concluded and are expected to continue for a longer period than was contemplated. In view thereof, the parties hereto have agreed, and by the execution of this instrument ("this Supplement") do hereby agree, to extend the Agreement for one additional year, i.e. for the calendar year 1974, on the basis set forth below:

1. The parties hereto shall share a cutback with respect to 1974

(A) only to the extent that the cutback results from Libyan Government action taken after the effective date of this Supplement in response to a party resisting the demands and actions of the Libyan Government in respect of participation on a basis consistent with terms assented to by the parties; and

(B) only to the extent that the cutback represents production lost on those whole days in 1974 on which the party claiming such cutback was completely shut-in.

2. The volume of a party's cutback with respect to any calendar quarter of 1974 which qualifies under paragraph 1 above shall be calculated by multiplying the number of whole days such party was completely shut-in during the quarter by such party's average daily production for the month of October 1972.

Such calculated volume shall be shared during 1974 to the same extent and on the same basis applicable under the provisions of the Agreement to the sharing of cutbacks with respect to 1973.

3. Each Non-Persian Gulf Producing Party shall be entitled to Middle East crude with respect to any calendar quarter of 1974 to meet commitments to pre-existing European and Western Hemisphere customers on the basis of the application of the provisions in paragraph 3 of the Agreement which are applicable to 1973, subject to the following:

(A) if such party's Libyan production is completely shut-in as a result of the type of Libyan Government action described in item 1(A) above for one or more days during such quarter of 1974, then such party's production level to be used for the purpose of calculating maximum Middle East crude entitlement shall continue to be that party's average daily production for the month of November 1971, or

(B) if the Middle East crude is claimed in replacement of Libyan crude supplied by a party under a sharing program pursuant to paragraphs 1 and 2 above, then such party's Middle East crude entitlement shall be equal to the net number of barrels of Libyan crude so supplied.

The provisions of paragraph 3 of the Agreement in respect of the maximum obligation to supply Persian Gulf crude in 1973 shall also be applicable in 1974.

4. Effective 1 January 1974 in respect of Middle East crude entitlement determined under paragraph 3 above, it is agreed that "15 cents" shall be substituted for "10 cents" wherever such number and word appear in paragraphs 4(a) and 4(b) of the Agreement; and it is further agreed that except for such substitution the rights of any Persian Gulf Producer under paragraph 4 of the Agreement shall not be modified, limited, conditioned or prejudiced by this Supplement.

5. It is understood that nothing contained in this Supplement shall obligate any party to take or refrain from taking any action with reference to the Libyan Government's demand for participation if to do so would, in its opinion, be contrary to its vital interests; provided however, that even if a party by taking or refraining to take any action forfeits any of the benefits to which it would otherwise be entitled, it shall not be relieved of any obligations hereunder.

6. The Agreement shall continue in force and effect unchanged through December 31, 1973, and, as modified herein, shall continue in effect through December 31, 1974 among the parties hereto.

This Supplement shall be deemed to have come into effect on November 21, 1972 among the signatory parties when John J. McCloy advises the parties hereto that the State Department and the Department of Justice have been informed of this Supplement and have interposed no objection.

Appendix E

IN WITNESS WHEREOF, the parties have signed this Supplement this 21st day of November, 1972.

Illegible
By: Illegible

Exxon Corporation
By: Charles J. Hedlund

Standard Oil Co. of Calif.
By: Illegible

The British Petroleum Co. Ltd.
Illegible

Mobil Oil Corporation
By: W. E. Lindenmuth

Continental Oil Co.
By: John E. Kircher

Nelson Bunker Hunt
By: Nelson Bunker Hunt

By: __________

By: __________

By: __________

Grace Petroleum Corp.
By: Illegible

Amerada Petroleum Corp. of Libya
By: Illegible

Gulf Oil Corporation
By: L. A. Turner

Marathon Oil Co.
By: Illegible

Occidental Petroleum Corp.
By: John V. Clarke

The Shell Petroleum Co. Ltd.
By: Illegible

By: __________

By: __________

By: __________

Appendix F

Opinion of the Circuit Court of Appeals for the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*

Before: Browning and Choy, Circuit Judges, and Gray,* District Judge.

Opinion

[December 27, 1976]

Appeal from the United States District Court for the Northern District of California

Choy, Cir. J.: Four separate actions, arising from the same series of events, were dismissed by the same district court and are consolidated here on appeal. The principal action is *Timberlane Lumber Co.* v. *Bank of America* (Timberlane action), an antitrust suit alleging violations of sections 1 and 2 of the Sherman Act (15 U. S. C. §§1, 2) and the Wilson Tariff Act (15 U. S. C. §8).[1] This action raises important questions concerning the application of American antitrust laws to activities in another country, including actions of foreign government officials. The district court dismissed the Timberlane action under the act of state doctrine and for lack of subject matter jurisdiction. The other three are diversity tort suits brought by employees of one of the Timberlane plaintiffs for individual injuries allegedly suffered in the course of the extended

* The Honorable William P. Gray, United States District Judge, for the Central District of California, sitting by designation.

1. The Wilson Tariff Act is a less comprehensive statute than the Sherman Act, often applied in combination with it. It has been said that the statute makes explicit the prohibitions of the Sherman Act in the field of foreign commerce. *United States* v. *General Electric Co.* [1948-1949 TRADE CASES ¶62,318], 80 F. Supp. 989, 1017 (S. D. N. Y. 1948).

anti-Timberlane drama. Having dismissed the Timberlane action, the district court dismissed these three suits on the ground of forum non conveniens. We reverse the Timberlane dismissal, vacate the dismissals in the other three cases, and remand.

I. The Timberlane Action

The basic allegation of the Timberlane plaintiffs is that officials of the Bank of America and others located in both the United States and Honduras conspired to prevent Timberlane, through its Honduras subsidiaries, from milling lumber in Honduras and exporting it to the United States, thus maintaining control of the Honduran lumber export business in the hands of a few select individuals financed and controlled by the Bank. The intent and result of the conspiracy, they contend, was to interfere with the exportation to the United States, including Puerto Rico, of Honduran lumber for sale or use there by the plaintiffs, thus directly and substantially affecting the foreign commerce of the United States.

Procedural Background

Some of the defendants moved to dismiss the Timberlane action.[2] After a hearing and submission of memoranda, affidavits, and depositions by both sides, the district court granted the motion in a brief judgment entered on March 20, 1974. The court gave as its reason "that it is prohibited under the act of state doctrine from examining the acts of a foreign sovereign state; and in any event, that there is no direct and substantial effect on United States foreign commerce," the latter apparently being deemed a prerequisite for jurisdiction. No specific findings

2. As specified below, other defendants have not been served and have not appeared.

of fact were announced, nor were any more extensive conclusions of law stated.[3]

It is unclear whether the decision was a dismissal for lack of subject matter jurisdiction or for failure to state a claim, F. R. Civ. P. 12(b)(1) & (6), or a summary judgment under F. R. Civ. P. 56. It appears from the transcript of the hearing that the district court and the defendants believed they were acting under Rule 12.[4] Plaintiffs here argue, however, that the defense motion was, in any event, based upon and incorporated affidavits which the court did not exclude, and as such it was a "speaking motion" which must be treated as a motion for summary judgment under the tests of Rule 56. Under Rule 56(e), they contend, they should have been allowed discovery.

Affidavits were submitted and cited by the defendants to the district court and again to us. These submissions were not explicitly excluded by the district court. Plain-

3. Only slightly more light on the court's reasoning is shed by a review of the transcript of the hearing, at the conclusion of which the court expressed its view as follows:

> "I am of the opinion that this action is an attempt to relitigate the Honduras litigation on the basis of a rather ingenius [*sic*] antitrust theory. However, even assuming the theory to have merit, I think the case of *Occidental Petroleum versus Buttes Gas* [1971 TRADE CASES ¶73,525], (331 F. Supp. 92 (C. D. Cal. 1971), affirmed [1972 TRADE CASES ¶74,063], 461 F. 2d 1261 (9th Cir.), cert. denied. 409 U. S. 960 (1972)) gives the last Appellate view on this situation.
>
> "I think the Act of State Doctrine does apply to the product of litigation in Honduras and I think that, under those circumstances, the motion to dismiss should be granted and that is the order.
>
> "Also of the opinion that this Court lacks jurisdiction on any theory of foreign commerce."

Reporter's Transcript 79.

4. Reporter's Transcript 77-78.

tiffs are correct in their assertion that Rule 12(b) requires Rule 56 treatment when a motion to dismiss for failure to state a claim (Rule 12(b)(6)) is made and "matters outside the pleading are presented to and not excluded by the court." *Erlich* v. *Glasser,* 374 F. 2d 681 (9th Cir. 1967). A motion to dismiss based on the act of state doctrine raises such a Rule 12(b)(6) objection, not a jurisdictional defect. *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.* [1971 TRADE CASES ¶73,525], 331 F. Supp. 92, 113 (C. D. Cal. 1971), aff'd [1972 TRADE CASES ¶74,063], 461 F. 2d 1261 (9th Cir.), cert. denied, 409 U. S. 950 (1972).

However, it is also true that summary judgment treatment under Rule 56 is not required for a Rule 12(b)(1) "speaking motion." 2A *Moore's Federal Practice* ¶12.09 [3], at 2297-2300, 2313 (2d ed. 1975). Therefore, because "speaking motions" to dismiss for want of subject matter jurisdiction are permitted, *id.* ¶12.09[2], at 2288, a dismissal based on affidavits alone without Rule 56 treatment might conceivably be sustainable on this ground.

On the other hand, if the district court did hold as its basis for dismissing for lack of subject matter jurisdiction that the alleged facts bore an insufficient relation to the foreign commerce of the United States, that same deficiency could also be considered a ground on which the suit could be dismissed for failure to state a claim under the antitrust laws. See *Hospital Building Co.* v. *Trustees of the Rex Hospital,* [1976-1 TRADE CASES ¶60,885], — U. S. —, — n. 1 (44 U. S. L. W. 4683, 4684 n. 1) (1976). Although the Supreme Court in *Hospital Building* did not elaborate, it seems settled that, when a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous. *O'Neill* v. *Maytag,*

339 F. 2d 764, 766 & n. 3 (2d Cir. 1964). See *Bell* v. *Hood,* 327 U. S. 678, 682-83 (1946). Such is clearly not the case here.[5]

Thus, if the district court dismissed under either Rule 56 itself or Rule 12(b)(6) (the proper motion for a defense pleading either the act of state doctrine or the lack of a sufficient nexus between the alleged violation and our foreign commerce) Rule 56 treatment would seem to have been indicated for the instant case. See also Rule 12(c).

Having secured Rule 56 treatment, it does not, however necessarily follow that plaintiffs were entitled under Rule 56(e) to full discovery. That section provides only that the "court *may* permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. (Emphasis added.) Accordingly, plaintiffs had no general right to discovery under the provisions of Rule 56(e).

Nevertheless, we note that the Supreme Court has expressed disapproval of summary disposition in this type of case:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motives and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Poller v. *Columbia Broadcasting System, Inc.,* [1962 TRADE CASES ¶70,228] 368 U. S. 464, 473 (1962). Putting plaintiffs

5. This test may, however, be irrelevant here because there is an additional "jurisdictional" hurdle which this suit must overcome due to its extraterritorial nature. See pp. 15-27, *infra.*

to the test in such cases without ample opportunity for discovery is particularly disfavored. *Hospital Building, supra* at — (4685). From our review of the allegations and affidavits of both sides, it is clear to us that the factual circumstances here involved are indeed complicated. Therefore, in spite of the non-mandatory nature of Rule 56(e), we do not feel that it was proper to dismiss the instant complaint without affording plaintiffs an opportunity for full discovery.[6]

Moreover, the affidavits and depositions which were offered to the district court indicate clearly that, at least as to the act of state defense, there remained issues of material fact to be resolved. Thus, summary judgment treatment of that issue would seem to have been inappropriate. As the above-quoted passage from *Poller* indicates, in-court testimony of witnesses and trial by jury generally are the preferred mode of disposing of cases such as this.

The only other possible basis on which the district court could properly have dismissed this suit would have been a ruling that plaintiffs, even with the aid of discovery and the benefit of all doubts on disputed points, could under no circumstances have established a claim for relief. We will, therefore, review the judgment on that basis, treating it as a Rule 12(b)(6) dismissal. Accordingly, we assume the allegations of the Timberlane plaintiffs to be true. Under the circumstances of the instant case, we find pertinent the recent observation of the Supreme Court in *Hospital Building*:

> We have held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of

6. As already noted, a decision on jurisdictional grounds based on the amount of lumber Timberlane might have sent to the United States may be an exception to this general statement. See n. 34, *infra*.

> facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957) (footnote omitted). And in antitrust cases, where "the proof is largely in the hands of the alleged conspirators," *Poller* v. *Columbia Broadcasting System, Inc.* [1962 Trade Cases ¶70,228], 368 U. S. 464, 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Applying this concededly rigorous standard, we conclude that the instant case is not one in which dismissal should have been granted.

Hospital Building, supra at — (4685).

Cast of Characters

There are three affiliated plaintiffs in the Timberlane action. Timberlane Lumber Company is an Oregon partnership principally involved in the purchase and distribution of lumber at wholesale in the United States and the importation of lumber into the United States for sale and use. Danli Industrial, S. A., and Maya Lumber Company, S. de R. L., are both Honduras corporations, incorporated and principally owned by the general partners of Timberlane. Danli held contracts to purchase timber in Honduras, and Maya was to conduct the milling operations to produce the lumber for export. (Timberlane, Danli, and Maya will be collectively referred to as "Timberlane.")

The primary defendants are BankAmerica Corporation, a California corporation, and its wholly-owned subsidiary, Bank of America National Trust and Savings Association, which operates a branch in Tegucigalpa, Honduras. Several employees of the Bank have also been named and served as defendants: Nasser Bonheur, manager of the Tegucigalpa branch from 1970 through January 1972; Jose Gonzales, Bonheur's successor as manager of the Tegu-

cigalpa branch; Luis Pazmino,[7] Regional Vice President for Central America, based in Guatemala City, with authority over the Tegucigalpa branch; and Henry Malatesta, Vice President and Senior Credit Administrator for Central America and the Caribbean based in San Francisco. Bonheur, Gonzales, Pazmino, and Malatesta are all citizens of the United States.

Other defendants have been named, but have not been served. Included in this group are two more Bank employees in Central America: Manuel Ruiz,[8] a citizen of the United States, and Patrick Byrne, a citizen of Canada. Also unserved are two Honduras corporations, Pedro Casanova e Hijos, S. A., and Importadores Mayoristas, S. de R. L., and Michel Casanova, a citizen of Honduras (together referred to as "Casanova"), who together represent one of the two main competitors to Timberlane and its predecessor in the Honduran lumber business.

Timberlane also cited defendants "Does I to X." Named and served as Doe I, but entering only a special appearance before the district court, was Laureano Gutierrez Falla, a citizen of Honduras and Honduran counsel for both the Bank and Danli during the time of the alleged conspiracy.

The Timberlane complaint identified two co-conspirators not named as defendants. Jose Lamas, S. de R. L. (Lamas) a Honduran corporation, is the second major competitor in the lumber business. Jose Caminals Gallego (Caminals), a citizen of Spain, is described as an agent or employee of the Bank in Tegucigalpa.

7. Pazmino was initially identified incorrectly as "Louis Pasmino."

8. Ruiz was initially identified incorrectly as "Ruis."

Facts as Alleged

The conspiracy sketched by Timberlane actually started before the plaintiffs entered the scene. At that time the Lima family operated a lumber mill in Honduras, competing with Lamas and Casanova, in both of which the Bank had significant financial interests. The Lima enterprise was also indebted to the Bank. By 1971, however, the Lima business was in financial trouble. Timberlane alleges that driving Lima under was the first step in the conspiracy which eventually crippled Timberlane's efforts, but the particulars do not matter for this appeal. What does matter is that various interests in the Lima assets, including its milling plant, passed to Lima's creditors: Casanova, the Bank, and the group of Lima employees who had not been paid the wages and severance pay due them. Under Honduran law, the employees' claim had priority.

Enter Timberlane, with a long history in the lumber business, in search of alternative sources of lumber for delivery to its distribution system on the East Coast of the United States. After study, it decided to try Honduras. In 1971 Danli was formed, tracts of forest land were acquired, plans for a modern log-processing plant prepared, and equipment purchased and assembled for shipment from the United States to Danli in Honduras. Timberlane became aware that the Lima plant might be available and began negotiating for its acquisition. Maya was formed, purchased the Lima employees' interest in the machinery and equipment in January 1972, despite opposition from the conspirators, and re-activated the Lima mill.

Realizing that they were faced with better-financed and more-vigorous competition from Timberlane and its Honduran subsidiaries, the defendants and others extended the anti-Lima conspiracy to disrupt Timberlane's efforts. The primary weapons employed by the conspirators were the

claim still held by the Bank in the remaining assets of the Lima enterprise under the all-inclusive mortgage Lima had been forced to sign and another claim held by Casanova. Maya made a substantial cash offer for the Bank's interest in an effort to clear its title, but the Bank refused to sell. Instead, the Bank surreptitiously conveyed the mortgage to Casanova for questionable consideration, Casanova paying nothing and agreeing only to pay the Bank a portion of what it collected. Casanova immediately assigned the Bank's claim and its own on similar terms to Caminals, who promptly set out to disrupt the Timberlane operation.

Caminals is characterized as the "front man" in the campaign to drive Timberlane out of Honduras, with the Bank and other defendants intending and carrying responsibility for his action. Having acquired the claims of Casanova and the Bank, Caminals went to court to enforce them, ignoring throughout Timberlane's offers to purchase or settle them. Under the laws of Honduras, an "embargo" on property is a court-ordered attachment, registered with the Public Registry, which precludes the sale of that property without a court order. Honduran law provides, upon embargo, that the court appoint a judicial officer, called an "interventor" to ensure against any diminution in the value of the property. In order to paralyze the Timberlane operation, Caminals obtained embargoes against Maya and Danli. Acting through the interventor, since accused of being on the payroll of the Bank, guards and troops were used to cripple and, for a time, completely shut down Timberlane's milling operation. The harassment took other forms as well: the conspirators caused the manager of Timberlane's Honduras operations, Gordon Sloan Smith, to be falsely arrested and imprisoned and were responsible for the publication of several defamatory articles about Timberlane in the Honduran press.

As a result of the conspiracy, Timberlane's complaint claimed damages then estimated in excess of $5,000,000.

Plaintiffs also allege that there has been a direct and substantial effect on United States foreign commerce, and that defendants intended the results of the conspiracy, including the impact on United States commerce.[9]

Act of State

The classic enunciation of the act of state doctrine is found in *Underhill* v. *Hernandez,* 168 U. S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

From the beginning, this principle has been applied in foreign trade antitrust cases. In *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909), the first such case of significance, the American owner of a banana plantation caught in a border dispute between Panama and Costa Rica claimed that a competitor violated the Sherman Act by persuading the Costa Rican government to seize his lands. The act complained of would have required an adjudication of the legality of the Costa Rican seizure, an action which the Supreme Court said our courts could not challenge. More recently, see *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.* [1971 TRADE CASES ¶73,525],, 331 F. Supp. 92 (C. D. Cal. 1971), affirmed [1972 TRADE CASES ¶74,063], 461 F. 2d 1261 (9th Cir.), cert denied, 409 U. S. 950 (1972), the case mentioned from the bench by the district court here in ruling in favor of the defense motion to dismiss.

9. Plaintiffs have, since filing the complaint, expanded and elaborated on their charges. Although our evaluation is centered on the complaint, the pleading is to be broadly constructed, and for the purpose of clarity the narrative here has drawn upon portions of the additional material.

The defendants argue—as the district court apparently held—that the injuries allegedly suffered by Timberlane resulted from acts of the Honduran government, principally in connection with the enforcement of the security interests in the Maya plant, which American courts cannot review. Such an application of the act of state doctrine seems to us to be erroneous. Even if the coup de grace to Timberlane's enterprise in Honduras was applied by official authorities, we do not agree that the doctrine necessarily shelters these defendants or requires dismissal of the Timberlane action.

The leading modern statement of the act of state doctrine appears in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964). Despite contrary implications in *Underhill* and *American Banana,* the Court concluded that the doctrine was not compelled by the nature of sovereignty, by international law, or by the text of the Constitution. *Id.* at 421-23. Rather, it derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government:

> The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Id. at 423. The Court recognized that not every case is identical in its potential impact on our relations with other nations. For instance:

> [S]ome aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our

> foreign relations, the weaker the justification for exclusivity in the political branches.

Id. at 428. Thus the Court explicitly rejected "laying down or reaffirming an inflexible and all-encompassing rule." *Id.* Whether forbearance by an American court in a given situation is advisable or appropriate depends upon the "balance of relevant considerations." *Id.*

It is apparent that the doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government. In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* [1962 TRADE CASES ¶70,361], 370 U. S. 690 (1962), the Canadian government had made a private corporation its exclusive agent for the purchase of vanadium, a material used in steel production. The Canadian corporation, acting in concert with an affiliated American company, used its position to exclude a competitor of the American affiliate from the Canadian market. The Court held that the Canadian corporation's activity was not entitled to immunity, carefully noting that the plaintiff did not question the validity of any action taken by the Canadian government and that there was no indication that any Canadian government official "approved or would have approved" of the monopolizing efforts. *Id.* at 706.

In *Alfred Dunhill of London, Inc.* v. *The Republic of Cuba,* — U.S. — (44 U.S.L.W. 4665) (1976), interventors appointed by the Cuban government to take possession of and operate nationalized Cuban cigar manufacturers had been paid large sums by importers in the United States and elsewhere for pre-nationalization shipments. These payments were found to have been made in error, since they should have been made to the prior owners of the cigar firms. The importers sought to recover the money. Counsel for the Cuban government and the interventors argued that the interventors' refusal to repay the pre-intervention

sums represented a sovereign repudiation of any obligation to refund the amounts and as such an act of state not subject to challenge in American courts. The Court disagreed, refusing to conclude that "the conduct in question was the public act of those with authority to exercise sovereign authority and was entitled to respect in our courts." *Id.* at — (4669). There was no proof that the failure of the interventors to repay the money reached the level of an "act of state," a sovereign assertion of the Cuban government:

> No statute, decree, order or resolution of the Cuban government itself was offered in evidence indicating that Cuba had repudiated her obligations in general or any class thereof or that she had as a sovereign matter determined to confiscate the amounts due three foreign importers.

Id.

A corollary to the act of state doctrine in the foreign trade antitrust field is the often-recognized principle that corporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability, as if it were an act of the state itself. Thus, in *Interamerican Refining Corp.* v. *Texaco Maracaibo, Inc.* [1970 Trade Cases ¶73,069], 307 F. Supp. 1291 (D. Del. 1970), a refusal by defendants to sell Venezuelan crude oil to plaintiff was held not to be an illegal restraint of trade because it was a complete defense that the Venezuelan government had imposed a boycott forbidding such sales. The court there observed that "[w]hen a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign." *Id. at* 1298.

On the other hand, mere governmental approval or foreign governmental involvement which the defendants had arranged does not necessarily provide a defense. In *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927),

the defendant were accused of conspiring to monopolize sales of sisal, a material used in making rope, from Mexico to the United States by inducing Mexican officials to recognize the conspirators as the exclusive traders and to impose discriminatory taxes on rival sellers. The Court rejected the defendants' claim to act of state protection, ruling that a conspiracy formed in the United States for the purpose of monopolizing sales to the United States was not protected simply because one element of the conspiracy involved securing favorable action by foreign officials. In *Continental Ore*, the Court indicated that it continued to accept the *Sisal* reasoning. See 370 U. S. at 705.

The distinction was recognized and relied upon in *United States* v. *The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cases ¶70,600 (S. D. N. Y. 1962), order modified, 1965 Trade Cases ¶70,352 (S. D. N. Y. 1965), the "*Swiss Watch*" case:

> If, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign nation. In the present case, however, the defendants' activities were not required by the laws of Switzerland. They were agreements formulated privately without compulsion on the part of the Swiss Government. It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government. Nonetheless, the fact that the Swiss Government may, as a practical matter, approved of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate.

See Davidow, ***Antitrust, Foreign Policy, and International Buying Cooperation,*** 84 Yale L. J. 268, 282-83 (1974); W. Fugate, ***Foreign Commerce and the Antitrust Laws*** 75-82 (2d ed. 1973); Kintner & Hallgarten, ***Application of United States Antitrust Laws to Foreign Trade and Commerce,*** 15 B. C. Ind. & Com. L. Rev. 343, 356-58 (1973).[10]

The touchstone of *Sabbatino*—the potential for interference with our foreign relations—is the crucial element in determining whether deference should be accorded in any given case. We wish to avoid "passing on the validity" of foreign acts. *Sabbatino,* 376 U. S. at 423. Similarly, we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of *Sabbatino,* at 428, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

While we do not wish to impugn or question the nobility of a foreign nation's motivation, we are necessarily interested in the depth and nature of its interest. The Restatement, Second, Foreign Relations Law of the United States §41 (1965) makes an important distinction on this basis in limiting the deference of American courts:

> [A] court in the United States . . . will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction *to give effect to its public interests.* (Emphasis added.)

The "public interest" qualification is intentional and significant in the context of Timberlane's action, as a comment to §41 makes plain:

10. While recognizing the general principle, we do not necessarily endorse the strict view that American courts can never review action compelled by a foreign government. There may be occasions when such review is nonetheless justifiable, but that question is not raised here.

> *Comment d. Nature of act of state.* An "act of state" as the terms is used in this Title involves the public interests of a state as a state, as distinct from its interest in providing the means of adjudicating disputes or claims that arise within its territory. . . . A judgment of a court may be an act of state. Usually it is not, because it involves the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to public interests.

Id. at 127.[11]

The so-called "act of state" here was the application by the courts and their agents of the Honduran laws concerning security interests and the protection of the underlying property against diminution. The judicial proceedings were initiated by Caminals, a private party and one of the alleged co-conspirators, not by the Honduran government. There is no indication that the court action reflected any official Honduran policy that Timberlane's efforts should

11. Illustrations 4, 5 and 6 accompanying this comment demonstrate how a court's judgment can be, but usually is not, an act of state:

> "4. In a suit in tort by X against Y, a court of state A decides that X is entitled to a specified amount of damages. This decision is not an act of state within the meaning of the rule stated in this Section.
>
> "5. In an action to determine title to land, brought by X against Y, a court of state A decides that X is the owner of the land. This decision is not an act of state within the meaning of the rule stated in this Section.
>
> "6. State A obtains by eminent domain proceedings title to an electric utility system in its territory. The vesting of title is an act of state within the meaning of the rule stated in this Section."

As used in this Restatement "state" refers to a sovereign nation, not to one of the United States.

be crippled or that trade with the United States should be restrained. Timberlane does not name Honduras or any Honduran officer as a defendant or co-conspirator, nor challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to relations between Honduras and the United States. Under these circumstances, the act of state doctrine does not require the dismissal of the Timberlane action.

Subject Matter Jurisdiction

There is no doubt that American antitrust laws extend over some conduct in other nations.[12] There was language in the first Supreme Court case in point, *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909), casting doubt on the extension of the Sherman Act to acts outside United States territory. But subsequent cases have limited *American Banana* to its particular facts, and the Sherman Act—and with it other antitrust laws—has been applied to extraterritorial conduct. *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.* [1962 TRADE CASES ¶70,361], 370

12. The subject of extraterritorial jurisdiction of American antitrust laws is one about which there has been a great deal of discussion. The commentaries cited in this opinion represent only a fraction of those discussing the subject. Worthy of special comment are K. Brewster, *Antitrust and American Business Abroad* (1958), and W. Fugate, *Foreign Commerce and the Antitrust Laws* (2d ed. 1973). There has, however been much less action. In actual litigation, jurisdiction has not often been found lacking. Up to May 1973, the Department of Justice filed some 248 foreign trade antitrust cases; not one was lost for want of jurisdiction over the activities claimed to violate the law. W. Fugate, *Foreign Commerce and the Antitrust Laws*, App. B., at 498 (2d ed. 1973). The instant case is, of course, a private action, but reported dismissals of such cases also appear to be infrequent. The only case lost on appeal on this ground was *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909), a decision which is today considered largely obsolete. Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 Antitrust L. J. 521 (1974).

U. S. 690 (1962); *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927); *United States* v. *Aluminum Co. of America* [1944-1945 TRADE CASES ¶57,342], 148 F. 2d 416, (2d Cir. 1945) (the "*Alcoa*" case)."[13] The act may encompass the foreign activities of aliens as well as American citizens. *Alcoa, supra; Swiss Watch*, 1963 TRADE CASES ¶70,600; *United States* v. *General Electric Co.* [1948-1949 TRADE CASES ¶62,352], 82 F. Supp. 753 (D. N. J. 1949), *judgment implementing decree* [1953 TRADE CASES ¶67,576], 115 F. Supp. 835 (D. N. J. 1953).

That American law covers some conduct beyond this nation's borders does not mean that it embraces all, however. Extraterritorial application is understandably a matter of concern for the other countries involved. Those nations have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts. See A. Neale, *The Antitrust Laws of the United States of America* 365-72 (2d ed. 1970); Assn. of the Bar of the City of New York, *National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations* 7-18 (1957); Zwarensteyn, *The Foreign Reach of the American Antitrust Laws*, 3 Am. Bus. L. J. 163, 165-69 (1965). Our courts have recognized this concern and have, at times, responded to it, even if not always enough to satisfy all the foreign critics. See *Alcoa* [1944-1945 TRADE CASES ¶57,342], 148 F. 2d at 443; *Swiss Watch*, 1965 TRADE CASES ¶71,352 (modification of order); *General Electric* [1953 TRADE CASES ¶67,576], 115 F. Supp. at 878 (implementation of decree). In any event, it is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.

13. For an extended discussion of this evolution, see W. Fugate, *supra*, at 40-43, 66-73; *Report of the Attorney General's National Committee to Study the Antitrust Laws* 66-76 (1955).

What that point is or how it is determined is not defined by international law. Miller, *Extraterritorial Effects of Trade Regulation,* 111 U. Pa. L. Rev. 1092, 1094 (1963). Nor does the Sherman Act limit itself.[14] In the domestic field the Sherman Act extends to the full reach of the commerce power. *United States* v. *South-Eastern Underwriters Assn.* [1944-1945 Trade Cases ¶57,253], 322 U. S. 533, 558 (1944). To define it somewhat more modestly in the foreign commerce area courts have generally, and logically, fallen back on a narrower construction of congressional intent, such as expressed in Judge Learned Hand's oft-cited opinion in *Alcoa,* 148 F. 2d at 443:

> [T]he only question open is whether Congress intended to impose the liability and whether our own Constitution permitted it to do so: as a court of the United States we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws." We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.

It is the effect on American foreign commerce which is usually cited to support extraterritorial jurisdiction. *Alcoa* set the course, when Judge Hand declared, *id.*:

> [I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance,

14. The tendency is for federal regulatory statutes to contain jurisdictional language as sweeping as the Sherman Act's "trade or commerce among the several states, or with foreign nations." 15 U. S. C. §§1, 2. Rarely are the terms precise or themselves limited enough to provide any guidance to the courts. Trautman, Appendix to Chapter 11 in K. Brewster, *supra,* at 313.

> for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.[15]

Despite its description as "settled law," *Alcoa's* assertion has been roundly disputed by many foreign commentators as being in conflict with international law, comity, and good judgment.[16] Nonetheless, American courts have firmly concluded that there is some extraterritorial jurisdiction under the Sherman Act.

Even among American courts and commentators, however, there is no consensus on how far the jurisdiction should extend. The district court here concluded that a "direct and substantial effect" on United States foreign commerce was a prerequisite, without stating whether other factors were relevant or considered. The same formula was employed, to some extent, by the district courts in the *Swiss Watch* case, 1963 Trade Cases ¶70,600, in *United States* v. *R. P. Oldham Co.* [1957 Trade Cases ¶68,790], 152 F. Supp. 818, 822 (N. D. Cal. 1957), and in *General Electric,* 82 F. Supp. at 891.[17] It has been identified and advocated by several commentators. See, e.g., W. Fugate, *Foreign Commerce and the Antitrust Laws* 30, 174 (2d ed. 1973); J. Van Cise, *Understanding the Antitrust Laws* 204 (1973 ed.). Similarly, see *Report of the Attorney General's*

15. Such an assertion of authority based on internal consequences is generally described as the "objective territorial" principal of jurisdiction. See W. Fugate, *supra,* at 35-39.

16. See, *e. g.,* A. Neale, *supra,* at 362-72; Haight, Comment to Miller, *supra,* 111 U. Pa. L. Rev. 1117, 1118-20 (1963); Ellis, Comment to Miller, *supra,* 111 U. Pa. L. Rev. 1129, 1129-32 (1963).

17. We note, though, that *Swiss Watch* and *General Electric* were there discussing aliens, not American citizens. *Oldham* said that the existence of a direct and substantial effect satisfied jurisdictional questions, but it did not say that jurisdiction could not be based on other considerations.

National Committee to Study the Antitrust Laws 76 (1955) ("substantial anticompetitive effects"); Foreign Relations Law Restatement §18.[18]

Other courts have used different expressions, however. See, e.g., *Thomsen* v. *Cayser*, 243 U. S. 66, 88 (1917) ("the combination affected the foreign commerce of this country"); *Alcoa* [1944-1945 TRADE CASES ¶57,342], 148 F. 2d at 444 ("intended to affect imports and exports [and] . . . is shown actually to have had some effect on them");[19] *United States* v. *Imperial Chemical Industries, Ltd.* [1950-1951 TRADE CASES ¶62,923], 100 F. Supp. 504, 592 (S. D. N. Y. 1951) ("a conspiracy . . . which affects American commerce"); *United States* v. *Timken Roller Bearing Co.* [1948-1949 TRADE CASES ¶62,380], 83 F. Supp. 284, 309 (N. D.

18. Restatement §18 reads:

"A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

"(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

"(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."

The "direct" and "substantial" requirements come from (b) (ii) and (iii). Comment *a* to this section specifically indicated, however, that this rule applies only to aliens, since United States citizens may be bound by nationality and only where there has been no significant conduct within the United States, since otherwise territorial jurisdiction could be asserted.

19. This portion of *Alcoa* referred only to a combination of foreigners, specifically for whom the intent requirement may have been imposed, not American citizens or corporations. Further, Judge Hand's opinion noted that either intent or effect individually might suffice, but that both were present in that case, so that question did not have to be faced.

Ohio 1949), modified and affirmed [1950-1951 TRADE CASES ¶62,837], 341 U. S. 593 (1951) ("a direct and influencing effect on trade"). See also citations in I J. von Kalinowski, *Antitrust Law and Trade Regulation* §5.02[2], at 5-120.

Different standards have been urged by other commentators. Julian von Kalinowski, *id.* at 5-122, advocates a "direct *or* substantial" effect test—"any effect that is not *both* insubstantial and indirect" should support jurisdiction—a view that was adopted by the district court in *Occidental Petroleum* v. *Buttes Gas & Oil Co.* [1971 TRADE CASES ¶73,525], 331 F. Supp. 92, 102-03 (C. D. Cal. 1971), affirmed on other grounds [1972 TRADE CASES ¶74,063], 461 F. 2d 1261 (9th Cir.), cert. denied, 409 U. S. 950 (1972). James Rahl turns away from a flat requirement of effects by concluding that the Sherman Act should reach a restraint either "(1) if it occurs *in the course of* foreign commerce, *or* (2) if it *substantially affects* either foreign or interstate commerce." Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws,* 43 Antitrust L. J. 521, 523. (1974).[20] In essence, as Dean Rahl observes, "[t]here is no agreed blackletter rule articulating the Sherman Act's commerce coverage" in the international context. *Id.*

Few cases have discussed the nature of the effect required for jurisdiction, perhaps because most of the litigated cases have involved relatively obvious offenses and rather significant and apparent effects on competition within the United States. *Id.*; P. Areeda, *Antitrust Analysis* 129 n. 455 (1974). It is probably in part because the standard has not often been put to a real test that it seems so poorly defined. William Fugate, who has identified the "direct and substantial" standard as the rule, has described

20. Both von Kalinowski and Rahl strive to bring the rule for foreign commerce closer to that for interstate commerce, about which more is said below. See *infra*, p. 26-28.

the meaning of that phrase as being "quite broad." W. Fugate, *supra*, at 174. What the threshold of significance is, however, has not been identified.[21] Nor is it quite clear what the "direct-indirect" distinction is supposed to mean.[22] It might well be, as was said in the context of transnational securities regulation:

> Although courts have spoken in terms of the *Restatement* and of congressional policy, findings that an American effect was direct, substantial, and foreseeable, or within the scope of congressional intent, have little independent analytic significance. Instead, cases appear to turn on a reconciliation of American and foreign interests in regulating their respective economies and business affairs. . . .

Note, *American Adjudication of Transnational Securities Fraud*, 89 Harv. L. Rev. 553, 563 (1976).

Implicit in that observation, as it is in several of the cases and commentaries employing the "effects" test, is the suggestion that factors other than simply the effect on the United States are weighed, and rightly so. As former Attorney General (then Professor) Katzenbach observed, the effect on American commerce is not, by itself, sufficient information on which to base a decision that the United States is the nation primarily interested in the activity causing the effect. "[A]nything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United

21. At least one observer has expressed concern that it might be quite low if economic effects can be aggregated in the manner of *Wickard* v. *Filburn*, 317 U. S. 111 (1942). Simson. *The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad*, 9 J. Int. L. & Econ. 233, 239-40 (1974).

22. See Simson, *supra*, at 240-41; Rahl, *supra*, 43 Antitrust L. J. at 524.

States." Katzenbach, *Conflicts on an Unruly Horse*, 65 Yale L. J. 1087, 1150 (1956).

The effects test by itself is incomplete because it fails to consider the other nation's interests.[23] Nor does it expressly take into account the full nature of the relationship between the actors and this country. Whether the alleged offender is an American citizen, for instance, may make a big difference; applying American laws to American citizens raises fewer problems than application to foreigners. As was observed in *Pacific Seafarers, Inc.* v. *Pacific Far East Lines, Inc.* [1968 TRADE CASES ¶72,587], 404 F. 2d 804, 815 (D. C. Cir. 1968), cert. denied, 393 U. S. 1093 (1969):

> If . . . [American antitrust] policy cannot extend to the full sweep of American foreign commerce because of the international complications involved, then surely the test which determines whether United States law is applicable must focus on the nexus between the parties and their practices and the United States, not on the mechanical circumstances of effect on commodity exports or imports.

American courts have, in fact, often displayed a regard for comity and the prerogatives of other nations and considered their interests as well as other parts of the factual circumstances,[24] even when professing to apply an effects test.[25] To some degree the requirement for a "substantial" effect may silently incorporate these additional considerations, with "substantial" as a flexible standard that varies

23. See A. Neale, *supra*, at 362-72; Simson, *supra*, 9 J. Int. L. & Econ. at 241-44; Fortenberry. *Jurisdiction over Extraterritorial Antitrust Violations*, 32 Ohio St. L. J. 519, 521, 534-36 (1971).

24. See W. Fugate, *supra*, at 70-73.

25. Indeed, few, if any, opinions have specifically employed the effects test alone or identified it as the sole criterion.

with other factors. The intent requirement suggested by *Alcoa* [1944-1945 TRADE CASES ¶57,342], 148 F. 2d at 443-44, is one example of an attempt to broaden the court's perspective, as is drawing a distinction between American citizens and non-citizens.[26]

The failure to articulate these other elements in addition to the standard effects analysis is costly, however, for it is more likely that they will be overlooked or slighted in interpretating past decisions and reaching new ones. Placing emphasis on the qualification that effects be "substantial" is also risky, for the term has a meanirg in the interstate antitrust context which does not encompass all the factors relevant to the foreign trade case.

Indeed, that "substantial effects" element of interstate antitrust analysis may well be responsible for the use of an effects test for foreign commerce. The Sherman Act reaches restraints directly intended to limit the flow of interstate trade or whose sole impact is on interstate commerce, but it also reaches "wholly local business restraints" if the particular restraint "substantially and adversely affects interstate commerce." *Hospital Building* [1976-1 TRADE CASES ¶60,885], — U. S. at — [44 U. S. L. W. at 4684]; *Gulf Oil Corp.* v. *Copp Paving Co.* [1974-2 TRADE CASES ¶75,402], 419 U. S. 186, 195 (1974); *United States* v. *Employing Plasterers Assn.* [1954 TRADE CASES ¶67,692], 347 U. S. 186, 189 (1954). By using the same expression as does the foreign jurisdiction test, two separate considerations may be combined and confused: (1) whether the restraint raises a claim cognizable under the Sherman Act, as opposed to being too local and insignificant a burden on interstate and foreign commerce, and (2) whether the interests of and links to the United States are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority. In some cases the direct

26. See *supra* notes 18-20.

and substantial effects test, used by the district court here, might open the door too widely by sanctioning a jurisdiction over an action when comity considerations would dictate dismissal. At other times, it might fail in the other direction, dismissing a case for which comity does not require forbearance, thus closing the jurisdictional door too tightly since the Sherman Act prohibits some restraints which do not have a direct and substantial effect.

We believe it is better to separate these two dissimilar inquiries. The first question is whether a violation of the Sherman Act has been alleged or proven. The assessment required here is like that in interstate cases. It does not raise a very high barrier, even for local restraints which must have a substantial effect: restrictions in plastering contracts in Chicago and the blocking of the relocation and expansion of a hospital in Raleigh, North Carolina have been held to qualify. *United States* v. *Employing Plasterers Assn.* [1954 TRADE CASES ¶67,692], 347 U. S. 186 (1954); *Hospital Building* [1976-1 TRADE CASES ¶60,885], —— U. S. —— [44 U. S. L. W. 4683] (1976).

The second question, particularly relevant to the problems posed by extraterritoriality, is more complicated, since a single criterion, like the effect on United States commerce, has proven inadequate to indicate whether American authority should be asserted. A more comprehensive inquiry is necessary. We believe that the field of conflict of laws presents the proper approach, as was suggested, if not specifically employed, in *Alcoa* in expressing the basic limitation on application of American laws:

> [W]e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws."

148 F. 2d at 443. The same idea is reflected in Foreign Relations Law Restatement §40:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction . . . .[27]

The act of state doctrine discussed earlier demonstrates that the judiciary is sometimes cognizant of the possible foreign implications of its action. Similar awareness should be extended to the general problems of extraterritoriality. Such acuity is especially required in private suits, like this one, for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed.[28]

What we prefer is an evaluation and balancing of the relevant considerations in each case—in the words of Kingman Brewster, a "jurisdictional rule of reason."[29] Balancing of the foreign interests involved was the approach

27. This section was obviously fashioned with trade regulation problems in mind, for all five illustrations presented in the comment to this section involve such regulation. It also seems to indicate that "jurisdictional" forebearance may be a question of discretion rather than power.

28. The risk inherent in such private suits has led one observer to suggest that they be prohibited by statute. Snyder, *Foreign Investment and Trade: Extraterritorial Impact of United States Antitrust Law,* 6 Va. L. Int. L. 1, 36-37 (1965).

29. K. Brewster, *supra,* at 446. See similar suggestions in Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order,* 32 Temp. L. Q. 295, 304-06 (1959); Fortenberry, *supra,* 32 Ohio St. L. J. 539-45; Simson, *supra,* 9 J. Int. L. & Econ. at 244-

(footnote continued on next page)

taken by the Supreme Court in *Continental Ore Co.* v. *Union Carbide Corp.* [1962 Trade Cases ¶70,361], 370 U. S. 690 (1962), where the involvement of the Canadian government in the alleged monopolization was held not to require dismissal. The Court stressed that there was no indication that the Canadian authorities approved or would have approved of the monopolization, meaning that the Canadian interest, if any, was slight and was outweighed by the American interest in condemning the restraint.[30] Similarly, see *Lauritzen* v. *Larsen,* 345 U. S. 571 (1953), where the Court used a like approach in declining to apply the Jones Act to a Danish seaman, injured in Havana on a Danish ship, although he had signed on to the ship in New York.

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United

46; Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation,* 22 Ohio St. L. J. 586, 588 (1961); Zwarensteyn, *supra,* 3 Am. Bus. L. J. at 170-71 (1965); Comment, *International Law: The Act of State Doctrine as a Limitation upon the Extraterritorial Application of United States Antitrust Laws,* 21 J. Pub. L. 151, 158-59 (1972); Note, *Extraterritorial Application of Federal Antitrust,* 20 Vand. L. Rev. 1030, 1056 (1967); Comment, *Extraterritorial Application of the Antitrust Laws,* 70 Yale L. J. 259, 272-87 (1960). See also *Restatement, Second, Conflict of Laws* §§6, 10, 42, 50.

30. See *supra,* p. 11.

States as compared with conduct abroad.[31] A court evaluating these factors should identify the potential degree of conflict if American authority is asserted. A difference in law or policy is one likely sore spot, though one which may not always be present.[32] Nationality is another; though foreign governments may have some concern for the treatment of American citizens and businesses residing there, they primarily care about their own nationals.[33]

31. *Foreign Relations Law Restatement* §40 states that a court should act

> in the light of such factors as
>
> (a) vital national interests of each of the states.
>
> (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

President (then Professor) Brewster lists the variables of:

> (a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad; (b) the extent to which there is explicit purpose to harm or affect American consumers or Americans' business opportunities; (c) the relative seriousness of effects on the United States compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them; (e) the degree of conflict with foreign laws and policies, and (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.

K. Brewster, *supra,* at 446.

32. Particularly in the field of trade regulation, American laws may not be duplicated by the other nation. That does not necessarily indicate a "conflict," however, since non-prohibition does not always mean affirmative approval. See P. Areeda, *supra,* at 127.

33. Some argue that a defendant's American citizenship might be enough by itself to support jurisdiction. See *Foreign Relations Law Restatement* §30.

Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

We conclude, then, that the problem should be approached in two parts: Is the alleged restraint cognizable under the Sherman Act, and should extraterritorial authority be exerted? The district court's judgment found only that the restraint did not produce a direct and substantial restraint on United States foreign commerce. That holding does not satisfy either inquiry.

The Sherman Act is not limited to restraints having direct and substantial effects, Timberlane has alleged that the restraint was intended to affect the export of lumber from Honduras to the United States—the flow of United States foreign commerce— and as such it is covered by the Sherman Act. Even viewed as a wholly local activity, the magnitude of the effect alleged would seem to qualify, at least at the jurisdictional stage, under *Hospital Building* and *Employing Plasterers.*[34]

The comity question is more complicated. From Timberlane's complaint it is evident that there are grounds for concern as to at least a few of the defendants, for some are identified as foreign citizens: Laureano Gutierrez Falla, Michel Casanova and the Casanova firms, of Honduras, and Patrick Byrne, of Canada. Moreover it is clear

34. It is at this point that the positions of the parties could possibly make some factual finding on the affidavits appropriate. Timberlane itself estimates that its production capacity was 16 million board feet per year and that it was able to ship only 2.4 million board feet to the United States in each of 1972 and 1973. If this diminution was inadequate under the *Hospital Building* standard, then dismissal might have been appropriate. We decline to so hold, however. Moreover, we note that Timberlane's allegation that the restraint applied directly on the flow of United States foreign commerce would remain, and that the Sherman Act does not carry a substantiality requirement for that form of hindrance.

that most of the activity took place in Honduras, though the conspiracy may have been directed from San Francisco, and that the most direct economic effect was probably on Honduras. However, there has been no indication of any conflict with the law or policy of the Honduran government, nor any comprehensive analysis of the relative connections and interests of Honduras and the United States. Under these circumstances, the dismissal by the district court cannot be sustained on jurisdiction grounds.

We, therefore, reverse and remand the Timberlane action.

II. The Smith, Ardon, and Lima Actions

Three employees of Maya in Honduras allege that they were personally injured in the course of the conspirators' harassment of Timberlane and have filed tort suits against the Bank and its corporate parent. Gordon Sloan Smith, a citizen of Canada and a resident of Honduras from 1971 through 1973 and of Miami since, asserts charges of malicious prosecution, abuse of process, and theft of personal property. Miguel Ardon and Jorge Lima are both citizens of Honduras, and both allege claims of malicious prosecution and abuse of process. Pursuant to local court rules, these suits were reassigned to the same district judge who had handled the Timberlane antitrust action, which by that time had already been dismissed. Shortly thereafter, the court granted the Bank's motion to dismiss the three suits on the ground of forum non conveniens.

Dismissal on the basis of forum non conveniens is within the district court's power. *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501 (1947). The fact that there is no lack of jurisdiction or mistake of venue does not foreclose application of the doctrine; indeed, proper jurisdiction and venue are assumed.

Gulf Oil noted that the decision falls within the discretion of the district court, but observed that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.* at 508-09. The Court also outlined some of the factors, reflecting both the private interests of the litigants and the public interests, to be weighed, a compendium we need not repeat.

Given the circumstances existing at the time of the dismissal, we would be reluctant to say that the district court abused its discretion. The alleged torts took place in Honduras. Most of the witnesses and evidence are apparently based there, as are two of the plaintiffs, and Honduran law would have to be applied. The only particular interest of the Northern District of California is that the Bank is headquartered there.

We need not make that decision, however, since the relevant circumstances have changed in the meantime. These three suits were evaluated by the district court after the Timberlane action had already been dropped. That action having been revived and remanded, it may be convenient and more efficient for the same court to hear these suits. We do not make that determination ourselves, but we believe that the circumstances have changed sufficiently to justify vacating the dismissals and remanding these cases to the district court for a fresh consideration.

Reversed and remanded as to the Timberlane action.

Vacated and remanded as to the Smith, Ardon, and Lima actions.